109-504

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1883.

No. 132.

ELIZABETH M. TOWNSEND, APPELLANT,

vs.

WILLIAM H. HOOPER, WILLIAM JENNINGS, JAMES TOWNSEND, AND BOLIVAR ROBERTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 16, 1880.

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a Be it remembered that on the 5th day of June, A. D. 1880, was filed in the office of the clerk of the supreme court of Utah Territory a transcript of the record in and of the district court of the third judicial district of said Territory of Utah in a certain cause theretofore pending in said district court, in which Elizabeth M. Townsend was plaintiff and William H. Hooper and others were defendants, of which transcript the following is a copy, to wit:

b Territory of Utah, supreme court.

ELIZABETH M. TOWNSEND, APPELLANT,
vs.
WILLIAM H. HOOPER, WILLIAM JENNINGS, James Townsend, and Bolivar Roberts, respondents.

RECORD.

J. G. Sutherland, P. T. Vanzile, Arthur Brown, for appellants; Williams & Young, Rosborough & Merritt, for respondents.

Filed June 5th, 1880. E. T. Sprague, clerk.

1 In the district court for the third judicial district of the Territory of Utah.

ELIZABETH M. TOWNSEND, PLAINTIFF,
vs.
WILLIAM H. HOOPER, WILLIAM JENNINGS, Bolivar Roberts, and James Townsend, defendants.

Said plaintiff complains against said defendant and alleges:

That in the year 1867 said plaintiff and said defendant James Townsend went into the actual possession of the real estate and premises situate in Salt Lake City and County, in the Territory of Utah, described as follows, being part of lot eight, in block sixty-eight, as platted in plat A, and bounded as follows, viz: Commencing at the northeast corner of said lot eight; thence south two hundred and sixty-five feet; thence west ten rods; thence north two hundred and sixty-five feet; thence east ten rods to the place of beginning, containing one hundred and sixty square rods and one hundred and sixty-five square feet, and have continued in the exclusive, actual, peaceable, and rightful possession thereof ever since; when the plaintiff and said James Townsend went into possession of said premises, as aforesaid, in 1866, the plaintiff, whose maiden name was Elizabeth Murray, was his plural wife, according to the rites and
2 tenets of the Mormon Church, of which they were members, she
having been united to him in that relation in 1858, and he having at the same time a former and lawful wife, with whom he also lived and cohabited; but in 1870, or before then, the plaintiff, from a repugnance to polygamy, ceased to cohabit with said James Townsend as a wife, and she

has not done so since that time. They thenceforth jointly occupied and improved said property and managed a hotel therein called the Townsend House. She was and continued to be an occupant of said premises in her own right, and as such had an equal right and interest therein with him, and which he conceded. They occupied, managed, and improved said property in that distinct and express understanding. The plaintiff and said James Townsend were occupants of said premises as two persons for their mutual and equal benefit, and had such possession and right of possession on the 21st day of November, 1871, and as such rightful occupants, mutually acknowledging each other's equal interest, they continued afterwards in possession of said premises and to manage said hotel, until the 9th day of February, 1878, and since that date have continued in possession by occupying in said hotel a suite of rooms, the hotel being managed under a lease from said Townsend, first, by one Charles C. Cunningham, and after the 1st of March, 1878, by defendant Roberts, and later by him and said defendants Hooper and Jennings. Said premises are situate within and form part of a tract of land in said Salt Lake City, Salt Lake County, in said Territory, subject to entry, and on the 21st day of November, 1871, in fact entered at the United States land office at said Salt Lake City, by Daniel H. Wells, as mayor of said city, in trust for the occupants thereof, under the act of Congress approved March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands, and the act of the Territory of Utah of February 17, 1869, prescribing rules and regulations for the execution of the trust arising under said act of Congress, and on the day of the said entry
by reason of the said plaintiff and said James Townsend's
3 rightful occupancy of said Townsend House premises, they were, as
to said premises, persons, and the plaintiff as to a half interest therein, was one of the persons for whose relief said act of Congress was passed, and they were exclusively entitled to a conveyance from said trustee, the mayor of said city, of the said premises in fee on payment of the Government price and complying with the said rules and regulations. The plaintiff was aware, in a general way, and vaguely understood that occupants of property in said mayor's entry, were entitled to purchase the same, and had the exclusive right to do so; but she was not informed of the particular time and manner prescribed by authority for making such purchase and obtaining such deed. As said James Townsend had a like interest in said premises, she relied upon him to give her the necessary information, and to counsel her as to what steps should be taken to preserve her rights, and to procure the legal title to her half of said property. On the 1st day of May, 1873, while the plaintiff and said James Townsend were still in the actual occupancy, and having an exclusive right to the possession of said Townsend House property, and occupied the same under said agreement and understanding, said James Townsend obtained a deed to himself alone of said premises, from the mayor of said city, conveying the entirety thereof to him, said Townsend, in fee, he paying therefor the nominal sum of three dollars and thirty cents, of money belonging equally to him and to her; he obtained said deed without any consultation with the plaintiff, and without her knowledge and consent, and she was not informed thereof until a subsequent year. When it came to her knowledge she requested said James Townsend to convey to her her said half interest, and he promised

to do so. He explained to her that he had not so taken said deed for the purpose of depriving her of the same, and then with his said promise satisfied her for the time being on account of her great confidence in him, and did not press him at that time to at once make said conveyance, but
she often did so subsequently; he uniformly admitted her right
4 to one-half of said property, and promised to convey it to her, but
never did. She therefore insists that as to an undivided half of said Townsend House property, said James Townsend, by means of said mayor's deed, obtained a title which belonged and still belongs to her of right, under said act of Congress, and her agreement and understanding aforesaid with said James Townsend; that upon his obtaining a deed thereof, as aforesaid, a trust binding upon him resulted in her favor therefor, which he in fact acknowledged, and which in equity and good conscience he was bound to fulfill by conveyance of such half to her. She has never relinquished, conveyed, or incumbered her said interest in said premises, nor has she done or suffered any act or thing which could impair, incumber, abate, or in any manner prejudice her title thereto; and said James Townsend not having performed said trust by conveying said proweaty to said plaintiff, she insists that she is entitled to the decree of this court to enforce the same. The defendants William H. Hooper, William Jennings, and Bolivar Roberts claim some interest in said premises adverse to said plaintiff, as purchasers, incumbrances or otherwise, but their rights are only such as they have questionably derived from said James Townsend, with notice of plaintiff, said possession and occupancy of said premises, and of her consequent rights and subject thereto. Wherefore the plaintiff prays the judgment and decree of this court that the purchase of said premises by said James Townsend from said mayor, May 1, 1873, was a trust for the plaintiff as to one undivided half of said premises; that the said claims of said defendants Hooper, Jennings, and Roberts have no validity or effect as to said plaintiff's half interest; and that said defendants Hooper, Jennings, and Townsend be required to convey the same to said plaintiff, and that their possession be declared to be in subordination to said plaintiff's title, and that the plaintiff may have such further or such olher relief as the nature of the case shall require and she entitled to.

J. D. LOMAX,
SUTHERLAND & KIMBALL,
Plaintiff's Attorneys.

5 SALT LAKE COUNTY, *ss:*

Elizabeth M. Townsend, being duly sworn, says: I am the plaintiff in the foregoing complaint; I have heard read and know the contents of said complaint and that the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to such matters I believe it to be true.

ELIZABETH M. TOWNSEND.

Sworn to before me this 27th day of April, 1878.
[SEAL.] ELI B. KELSEY,
Notary Public.

(Endorsed:) Filed Apr' 20, 1878. C. S. Hill, clerk, by H. G. McMillan, deputy clerk.

Summons issued in usual form April 29, 1880.

Return endorsed, showing personal service on all of defendants, April 29th, 1878.

(Title.)

ELIZABETH M. TOWNSEND, PLAINTIFF,
vs.
WILLIAM H. HOOPER, WILLIAM JENNINGS, James Townsend, & Bolivar Roberts, defendants.

The said defendants, William H. Hooper and William Jennings, answering the complaint herein, deny, upon their information and belief, that said plaintiff went into possession of said lands and premises, with said defendant James Townsend, or otherwise, in the year 1866, or at any other time, or that she, with said Townsend, or otherwise, continued ever since, or for any time, in the actual or peaceable or rightful possession thereof; and deny that said plaintiff ever went into or upon said premises at any time before these defendants acquired possession of and title thereto as hereinafter shown, except under the name, claim, and guise of wife of said James Townsend; and, upon their information and belief, these defendants deny that said plaintiff, in the year 1870, or before that time, from a repugnance to polygamy or any other motive or cause, ceased to
cohabit with said James Townsend as his wife, but, on the con-
6 trary, these defendants aver that during all the time the said plaint-
iff has inhabited or been upon said premises, until the moving of
this suit, she held herself out to the world and claimed to be the wife of said Townsend, and assumed his name under such claim, and he, in like manner, held himself out to the world and to all persons with whom he dealt and from whom he obtained credit, as her husband; and these defendants allege, upon their information and belief, founded not only upon such assumed and reputed relation and corresponding conduct of said plaintiff and said James Townsend, but also upon the sworn statements and admissions of both of these, made in this court to that effect and tenor, that they have been during all the time aforesaid, and until within three weeks last past, cohabiting together as usual and without any visible or ostensible change of relations.

These defendants deny that said plaintiff and said James Townsend, as owners or claimants, jointly occupied or improved said property, or managed said hotel thereon, but allege, on the contrary, that said James Townsend bought, occupied, and improved said property, and kept and managed said hotel, in his own name and right, and, during all the time he possessed the same, claimed and held the exclusive ownership thereof, and on the faith of such claim (undisputed by said plaintiff) obtained credit and incurrrd debts to a large amount and mortgaged said property as security therefor as hereinafter stated; and deny that said plaintiff was or continued to be an occupant of said premises in her own right, or had an equal or any right or interest therein with said James Townsend; and deny said plaintiff and James Townsend, or either of them, now possess or occupy said premises, or any part thereof, in any other sense or way than as a guest occupying a room or rooms in a public house owned and managed by another person.

These defendants, upon their information and belief, deny that said plaintiff and said James Townsend, as occupants of said premises, or otherwise,
mutually acknowledged each other's equal rights or interests in said
7 premises, on the 21st day of November, 1871, or at any other time,
but allege that if any such acknowledgement was ever made, the same was concocted in secret between them, since said Townsend became involved in debt, and with the purpose and intent of defrauding his creditors, and especially these defendants, who had given him credit on the faith of the notorious fact that he owned, without dispute, the whole of said premises.

As to said half interest, or any interest whatever, in said lands and premises, these defendants deny that said plaintiff, either as the wife of said James Townsend (without any interest in said property), as she for long, and until recently, claimed and represented herself to be, or as his concubine, without the rights or disabilities of a wife, and without faith in polygamy, as she now, for the purpose of this suit, assum*ing* to be, was or is, as to said property, one of the persons for whose relief said town-site act of Congress was passed; and denies that said plaintiff, either in her own right or jointly with said James Townsend, ever was or is entitled to a conveyance of said premises, or of any estate or interest therein, from said mayor, under the operation of said town-site law; and deny that said plaintiff did not have notice of the time and manner prescribed by authority for obtaining mayor's deeds to property in said Salt Lake City under said town-site laws, but allege that the true reasons why she did not apply for such deed for said premises was that she had no interest therein and no right to such deed, and was not, as to said property, a beneficiary under said laws.

These defendants deny that said James Townsend obtained said mayor's deed to said premises whilst he and said plaintiff occupied the same under said alleged agreement or understanding, or any agreement whereby the title or any interest therein should insure to said plaintiff; and deny that said plaintiff paid or contributed any part of the modicum of purchase-money paid by said James Townsend to obtain said mayor's deed for said
premises, but, on the contrary, allege that said Townsend paid not
8 only such purchase-money, but also many thousands of dollars previously for the purchase of the possessory right to said premises and for erecting improvements thereon.

These defendants, upon their information and belief, deny that said James Townsend obtained said conveyance of said premises from said mayor without the knowledge of said plaintiff, or that she was not informed thereof until a subsequent year; furthermore, if said plaintiff was not his wife, and has not been cohabiting with him since 1870, as she now asserts, these defendants are not aware of any obligations on his part, or of any right on hers, requiring him in 1871 or afterwards to disclose his business transactions to her, or to advise her of matters of law or of her pretended rights.

For further answer and defence in this behalf these defendants aver that they are now the owners of said lands and premises with the tenements, hereditaments, and appurtenances thereunto appertaining, and have possession and the right of possession thereof, and, in support of their title and possession allege and show the following facts, viz:

The first and original occupant of said premises was Isaac Rogers, since deceased; the next was Thomas Rhodes, who conveyed the same to Hiram B. Clawson by deed dated November 18th, 1858. Said defendant James Townsend purchased said premises about the 18th day of March, 1865, and received a conveyance thereof from said Clawson, dated the day and year last aforesaid, for a consideration of $6,450, and entered thereunder; the defendants aver upon their information and belief that said James Townsend paid the whole of such purchase-money for such possessory title to said property, and that said plaintiff paid no part thereof.

In the year 1868 said James Townsend, being in the exclusive possession of said premises, and claiming to own the whole thereof, borrowed several sums of money amounting to $10,000 in the aggregate from said defendant Hooper, executed his three promissory notes therefor, and secured the payment of such indebtedness by two trust-deeds on said
9 premises. The moneys so borrowed were expended chiefly in
erecting the improvements on said premises.

On the 24th day of September, 1873, said indebtedness to said defendant, Hooper, amounted to $12,500, principal and interest, and said James Townsend, who had before that time received said mayor's deed of said property, and held and possessed the same in fee-simple, in order to obtain further time for payment and avoid the statute of limitations, renewed said obligations by executing his three promissory notes for $5,000, $5,000, and $2,500, respectively, bearing interest at one and one half per cent. per month, from date, dated the day and year last aforesaid, and payable at one year, and at the same time, in order to secure the payment of the same, executed and delivered to Louis S. Hills and Horace S. Eldridge, trustees, a trust-deed whereby he conveyed said premises to them in trust, conditioned with apt provisions for the payment of said last-named indebtedness, accord- to the terms of notes by which the same were evidenced, and authorizing said trustees, in default of payment of said debt according to contract as aforesaid, to sell said property and convey the same to a purchaser, and to pay said indebtedness out of the proceeds. Said last-mentioned trust-deed was filed for record in the office of the county recorder of said county, on the 24th day of September, 1873, and was therein duly recorded, reference thereunto being hereby made for all particulars.

On the 18th day of September, 1875, said James Townsend being still in the exclusive possession of said premises, and claiming the whole thereof, executed his mortgage upon said premises to C. C. Cunningham, conditioned for the payment to said Cunningham of the sum of $2,500, one year after date, with interest at 2 per cent. per month, according to the terms of his promissory note of even date with such mortgage; these defendants state upon their information and belief that this debt was for money borrowed by said James Townsend from said Cunningham, who afterwards assigned and transferred said promissory note to said
10 defendant Roberts, who whilst a balance of about $1,000 was still
due thereon transferred and delivered the same to said defendant Jennings who afterwards assigned and sold one-half thereof to said defendant Hooper.

On the 8th February, 1878, said James Townsend being still in possession of said premises, and claiming the exclusive ownership and title thereof, by his lease dated the day and year last aforesaid, let the whole thereof to said Cunningham for the term of two years thereafter, and then and there delivered the possession thereof to said Cunningham. Afterwards, on the 21st day of February, 1878 said Cunningham, with the consent of said James Townsend, assigned, sold, and transferred his said lease of said premises to the defendant Roberts, and afterwards delivered to him the possession of said premises. Said Roberts, after the sale of said premises to said Jennings, as hereinafter stated, surrendered his said lease and the possession of said premises to said Jennings, who then and there went into the possession of said property as the owner thereof.

Said defendant James Townsend borrowed $5,000 from said defendant Roberts about the 10th day of October, 1876, and executed to him therefor his promissory note and a mortgage on said premises, dated the day and year last aforesaid, to secure the payment thereof within one year thereafter with interest thereon at 2 per cent. per month, which mortgage was recorded in said recorder's office on the 18th day of October, 1876; said Roberts afterwards sold and transferred said debt and security to said defendant Jennings, and said James Townsend has never paid the same, otherwise than by application of the proceeds of the sale of said property to said Jennings by said trustees, as hereinafter stated.

On the 11th day of March, 1878, a judgment was duly made and rendered by this court against the said James Townsend, and in favor of the
defendant Jennings, for $2,802.75 debt, and $22.45 costs, which
11 judgment was then docketed and became a lien upon said Townsend's interest in said premises.

On March 12, 1878, a judgment was duly made and entered in this court against said James Townsend and in favor of the Deseret National Bank, for $1,336.38 debt, and $72.20 costs, which judgment was then and there docketed and became a lien on said premises, and has since been assigned, to and is held by these defendants.

These defendants allege that the whole of said indebtedness of said James Townsend was incurred by him alone for means either to erect improvements upon said premises, or for expenses in and about the business of managing and carrying on the business in said hotel in his own name and right; that during all the time aforesaid, whilst said James Townsend was obtaining credit, borrowing money, and executing the securities and lease aforesaid, with her knowledge, said plaintiff never set up or pretended any claim whatever to said premises or to any interest therein, and these defendants never had any notice whatever that she claimed or pretended to have any interest therein until after said defendant Jennings had bought said premises, nor until the commencement of this action.

These defendants further allege that on the 10th day of April, 1878, more than $16,000 was due to said defendant Hooper from said James Townsend on his said promissory notes, secured by said last-mentioned deed of trust; that on the day and year last-aforesaid said trustees Hill and Eldredge, pursuant to the provisions of such deed of trust, by virtue of the powers and duties thereby conferred and prescribed, in the manner on due notice, and at the place therein, sold said premises at public auction to said defendant Jennings for $22,500 (he being the highest bidder, and that being the highest price bid therefor at such sale), which was paid by him to said trustees, and the proceeds of such sale thereupon became applicable to said several liens in the order of

their priority; and said trustees, in final discharge of said trust,
12 and by virtue of the powers coupled therewith, on the 13th day of
April, 1878, conveyed said premises, and all the estate which said James Townsend had therein on the said 24th day of September, 1873, to said defendant Jennings, by *and* dated the day and year last aforesaid, and said Jennings has since conveyed the one-half thereof, undivided, to said defendant Hooper, for a valuable consideration; and these defendants now own, hold, and possess said premises and appurtenances.

And these defendants further allege that a controversy having arisen between said James Townsend and the heirs of said Isaac Rogers about the ownership of said premises, the said James Townsend bought and extinguished such adverse claim derived through said Rogers, at a cost of about $3,150, and these defendants believe he paid the whole of this money, and said plaintiff did not pay any part thereof.

The defendants allege that said James Townsend obtained the large credits and long indulgencies aforesaid on the faith of his absolute ownership of the whole of said premises, and that he could not have obtained the same if the claim now set up by said plaintiff had been made known.

For further defense these defendants allege that they and their grantors and predecessors in interest have held, claimed, and possessed said premises adversely to all the world (except the United States) for more than ten years next before the commencement of this action.

For a further defense these defendants allege that the corporate authorities of said city, within thirty days after the entry of the said land by the said mayor, as stated in said complaint, gave due notice of such entry, and that the plaintiff did not make or deliver to the clerk of the probate court of said county any statement in writing containing a description of the said land, or the right, interest, or estate therein claimed by her within six months, nor at any time after the first publication of the said notice of such entry.

In conclusion these defendants allege, upon their information
13 and belief, that said Townsend, finding himself unable to longer
hold said property and pay off said incumbrances, has conspired with said plaintiff to cheat and defraud these defendants by the false and fraudulent pretenses now set up in her name, and to that end is promoting this action in bad faith and self-stultification, and they insist that said plaintiff by reason of her conduct and of the matters aforesaid is estopped from setting up any claim to said premises and ought not now to be heard in that behalf.

Wherefore these defendants demand judgment against said plaintiff for their costs.

ROSBOROUGH & MERRITT AND
WILLIAMS & YOUNG,
Attorneys for said Defendants.

TERRITORY OF UTAH,
County of Salt Lake:

William H. Hooper, being duly sworn, declares that he is one of the defendants in the above-entitled action; that he has heard the foregoing answer read and understands it, and that the same is true of his own knowledge, except as to the matters which are therein stated on the plaintiff's information and belief, and as to those matters that he believes it to be true.

W. H. HOOPER.

Subscribed and sworn to before me this 9th day of May, 1878.
[SEAL.] WM. CLAYTON,
Notary Public.

(Endorsed:) Filed May 9, 1878. C. S. Hill, clerk, by B. P. Hill, deputy.

(Title.)

ELIZABETH M. TOWNSEND, PL'FF,
vs.
WM. H. HOOPER, WM. JENNINGS, JAMES TOWNSEND, and Bolivar Roberts, defendants.

The said defendant Bolivar Roberts, for his separate answer to plaintiff's complaint, denies that he has or claims any interest whatever in the property described in said complaint, and hereby disclaims any interest whatever in the same.

14 Defendant further says that he did own and claim some mortgages on said property and a lease thereof, but that before the commencement of this suit he had, for a valuable consideration and in good faith, sold and transferred said mortgages to the defendant William Jennings, and that the defendant William Jennings having become the owner of said property, as this defendant was informed and believes, he, the said defendant, before the commencement of the suit, had, at the instance and request of the said Jennings, cancelled and surrendered said lease.

Wherefore defendant prays to be hence dismissed with the costs of this suit.

SHEEKS & RAWLINS,
Attorneys for Defendant Bolivar Roberts.

TERRITORY OF UTAH,
Salt Lake County, ss:

Bolivar Roberts, the above-named defendant, being first duly sworn, on his oath saith that he has heard the foregoing answer read and knows the contents thereof, and that the same is true of his own knowledge.

BOLIVAR ROBERTS.

Subscribed and sworn to before me, May 9th, 1879.
C. S. HILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

(Endorsed:) Filed May 9th, 1878. C. S. Hill, clerk.

ELIZABETH M. TOWNSEND, PLAINTIFF,
vs.
WM. H. HOOPER, WM. JENNINGS, JAMES TOWNSEND, and Bolivar Roberts.

Said plaintiff, by leave of court first had and obtained, further complaints,

by way of supplement to the complaint heretofore filed, and alleges, that she has continued since the filing of the complaint in the above-entitled action in actual possession of one of the rooms occupied by her at that time, as stated in said complaint; that said room is furnished with her furniture and bed ; that she is now in possession of
15 said room ; that she was at the commencement of this suit, has continued ever since to be, and still is in such possession in her own right, and in the right which she asks in and by said complaint to have confirmed by the decree of this court; that said defendants have suspended the business of keeping a hotel on said premises, and all that portion thereof not in the plaintiff's possession is occupied by the servants of said defendants Hooper and Jennings, who live in the said Townsend House, and hold the keys to all the outside doors of same ; that the plaintiff is now sick in her said room in said house, and in care of a physician, and needing hourly the care and attention of nurses; that during the last two or three days said defendants Hooper and Jennings have endeavored, and are now endeavoring, to take advantage of plaintiff's serious illness to compel her to release her rights in said premises, and relinquish and abandon the same ; that for this purpose, as plaintiff is informed and believes, said Hooper and Jennings have given orders to their servants in said house not to allow any persons to visit said plaintiff, and in pursuance of such orders, on the 5th day of December, 1878, said servants refused admission to a lady who applied to be admitted to bring to plaintiff medicines prescribed for her by her physician, and other necessary articles for her comfort for the night; that said lady, as plaintiff is informed and believes, then applied personally to said Jennings for such admission, explaining the object ; that he refused with great discourtesy of manner, threatening to cause her to be sent to the police jail; that she applied personally to defendant Hooper, who with mock graciousness and sympathy offered to procure such admission to plaintiff's room if the plaintiff would write him a note, relinquishing all rights to said premises, and admit she was occupying said room as his guest ; that on receipt of such note he would yield to his humane feelings and supply her with coal and all the comforts necessary to her condition, but otherwise she would not be permitted to have anybody visit her, and when she should go out, should not herself be per-
16 mitted to return, all of which actings and doings of said defendants Hooper and Jennings are fraudulent and oppressive, and contrary to equity. In consideration whereof the plaintiff prays the injunction, order, and decree of this court, that said defendants Hooper and Jennings at once, and until the hearing of this action, desist and refrain from obstructing ingress and egress to and from her room in said Townsend House, and all hindrance to her, her servants, or others desiring to visit her, in going to and from her said room, and with such parcels as her wants may require, or as she or they may desire to carry, and that on the hearing of this action the said injunction made coextensive with her title to and interest in said property may be made perpetual, and that she may have such other and further relief in the premises as she may be found equitably entitled to.

J. D. LOMAX &
J. G. SUTHERLAND,
Plaintiff's Attorneys.

TERRITORY OF UTAH,
Salt Lake County, ss:

J. D. Lomax, being duly sworn, says: I know the contents of the foregoing supplimental complaint, and the same is true of my own knowledge, except the matters that are therein stated on information and belief, and as to such matters I be'it to be true. I make this affidavit because the plaintiff is sick, and access to her is denied by persons in charge of the outer doors leading to her apartments at the Townsend House.

J. D. LOMAX.

Sworn to and subscribed before me this 6th day of December, 1878.

C. S. HILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

17 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, C. S. Hill, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original supplemental complaint in the above-entitled action, filed in my office, Dec. 7, 1878.

Witness my hand and the seal of said court, at Salt Lake City, this 7th day of December, A. D. 1878.

[SEAL.] C. S. HILL, *Clerk,*
By H. G. McMILLAN, *Deputy Clerk.*

(Endorsed:) Filed Dec. 7, 1878. C. S. Hill, clerk, by H. G. McMillan, deputy.

ELIZABETH M. TOWNSEND, PL'FF,
vs.
WM. H. HOOPER, WM. JENNINGS, JAMES TOWNSEND, & Boliver Roberts, def'ts.

Now come said defendants William H. Hooper and William Jennings, and by leave of the court, on consent of the parties in open court, file this supplemental answer:

The defendants allege that after the sale of said lands and premises by said trustees Hills and Eldredge, in the month of April, 1878, pursuant to the terms of said trust-deed, and while the proceeds of such sale were in the hands of said trustees, said plaintiff set up a claim to all surplus proceeds thereof over and above such amount as was necessary to pay and satisfy said debt due to said defendant Hooper secured by said deed of trust, and the costs and charges of such sale, and demanded from said trustees the delivery to him of all such surplus proceeds. These defendants aver that at and before the time of sale of said premises by said trustees said plaintiff had created and suffered the numerous liens upon said property and his interest and estate therein mentioned in said complaint which subsisted at the time of such sale, but were all subsequent and subject to that of defendant Hooper, created by said deed of trust, the said subsequent liens being the two mortgages on said real estate and premises executed by said plaintiff and admitted in his complaint, and the

two judgments therein mentioned, rendered and given by this court
18 against said plaintiff, as follows: One judgment rendered and docketed on May 11th, 1878, in favor of defendant Jennings, for $2,802.75 debt and $22.45 costs, and the other in favor of the Deseret National Bank of Salt Lake City, on the 12th day of March, 1878, for $1,336.38 debt and $72.20 costs. That executions were issued out of this court upon both of said judgments against the property of said plaintiff and delivered to the United States marshal for said Territory, who on the 10th day of April, 1878, after said sale by said trustees, and while the proceeds thereof were in their hands, served the same by levying the same on the surplus of such proceeds, whereby and by virtue of subsisting equities the owners of said judgments became and were entitled to a lien upon said surplus moneys with the owners of said mortgage liens, in the order of their priorities.

The defendants further aver that at the time said plaintiff claimed and demanded said surplus proceeds of sale of said premises these defendants had become and were the owners of said debts secured by said subsequent liens; that they had purchased said debts and liens for valuable considerations, and then held the same by right of purchase, and by virtue of assignments and delivery of the same to them, and the same then remained unpaid and were all overdue; that in consequence of said plaintiff's said claim and demand for said surplus proceeds of sale, and in order to determine the respective rights of the parties in the premises, these defendants, on the 20th day of April, 1878, brought their action in this court against the said plaintiff and said trustees Hills and Eldredge, then holding said surplus moneys, to marshall said assets, to establish the priorities, and to determine the claims of the respective parties to said fund; and thereupon such proceedings were had in such cause that on the 23d day of March, 1878, a judgment and decree was duly given, made, and entered, whereby it was adjudged and decreed against the claim of said plaintiff that the said two mortgages on said premises and two judgments then held
19 by these defendants became and were liens upon said premises in the order of their respective dates, and after said sale by said trustees became and were liens upon said surplus moneys in the same order of priority, and that said trustees apply said surplus moneys, as far as the same would go, in the following manner and order, viz: 1st, to pay $1,299.67 principal and interest due on said $2,500 note and mortgage given to said Cunningham; 2d, to pay $6,540 due on the note and mortgage, $5,000, given to said Roberts; 3d, to pay $2,824.45 due on said judgment recovered by said Jennings; and, 4th, to pay $1,408.58 due on said judgment recovered by said Deseret National Bank of Salt Lake City.

And these defendants allege that said surplus funds were applied accordingly; that the amounts of said subsequent liens established by said decree was, in the aggregate, $12,072.70, and the amount of said surplus moneys so applicable and so applied was $6,054, and there still is a balance of $6,018.70 due and owing from said plaintiff to these defendants upon said demands.

These defendants further allege that since the sale of said premises, and on the 29th day of April, 1878, one Elizabeth M. Townsend, who claims to be the wife of said plaintiff, brought an action in this court against these defendants, wherein she sets up a claim to one-half, undivided, of said premises, as a tenant in common with said plaintiff, and seeks to recover such interest from these defendants, which action is still pending.

These defendants aver that they never had any notice of such claim or pretense until said action was brought; and allege, upon their information and belief, that said Elizabeth M. Townsend and said plaintiff have fraudulently conspired and confederated together to bring and maintain said suit for the purpose of defrauding these defendants, well knowing that the said claim of the said Elizabeth M. Townsend is false.

20 Wherefore these defendants, as heretofore, pray to be hence dismissed with judgment for their costs.

WILLIAMS & YOUNG,
ROSBOROUGH & MERRITT,
Attorneys for Defendant Hooper.

TERRITORY OF UTAH,
Salt Lake County, ss:

William H. Hooper, being duly sworn, on his oath says that he is one of the defendants in the above action; that he has read the foregoing supplemental answer, and knows and understands the contents thereof, and that the same is true of his knowledge, except that portion thereof stated on information and belief; and, as to that, he believes to be true.

WM. H. HOOPER.

Subscribed and sworn to before me this 7th day of October, 1878.
[SEAL.] N. W. CLAYTON,
Notary Public.

Filed Dec. 7th, 1878.

C. S. HILL, *Clerk.*

(Title.)

ELIZABETH M. TOWNSEND, PL'FF,
vs.
WM. H. HOOPER, WM. JENNINGS, JAMES Townsend, & Boliver Roberts, def.

This cause having been heard and submitted upon the complaint, the answer of defendants Hooper, Jennings, the separate answer and disclaimer of defendant Roberts, the proofs and exhibits of the respective parties, and argument of their counsel, and all and singular the premises having been fully considered, the court doth find the following facts:

1st. The first occupant of the town lot and premises in question was one Isaac Rogers and the next Thomas Rhoads. Rhoads in 1858 conveyed and delivered possession thereof to H. B. Clawson, who on the 18th day of March, 1865, sold and conveyed the same to defendant James Townsend, for the sum of about $6,000, and he then entered into possession of the premises. Afterwards, on the 30th day of December,
21 1872, said James Townsend purchased from the heirs of said Rogers their adverse claim to the premises; and on the 6th day of June, 1873, purchased from Henry M. Garvey the adverse claim held

by him, as grantee of said heirs, for something over $3,000, and all of said purchase-money was paid by defendant Townsend.

2nd. Defendant Townsend was married to a lawful wife about the year 1828, and continued to live with her in that relation until her death, in 1870; and defendants Hooper and Jennings were previously acquainted with them and knew their relations in 1868 and long prior to that date. In 1858 he entered into a polygamous marriage with the plaintiff, according to the rites of marriage of the church of which the plaintiff and James Townsend were members, as were also defendants Hooper and Jennings; and said Hooper and Jennings at that time had notice of the actual polygamous relations between plaintiff and James Townsend.

3rd. In the fall of 1866 defendant Townsend went on said premises to reside, taking with him his said lawful wife and the plaintiff as his polygamous or plural wife, and commenced keeping a hotel there, the plaintiff taking an active part in conducting such business, the lawful wife, being then old, taking no part in the affairs of the house.

4th. The defendant Townsend continued actual cohabitation with the plaintiff as his polygamous wife, on said premises, until the fall of 1867, when he concluded to take a second polygamous wife, to which the plaintiff objected and threatened to return to England; whereupon, in order to induce her to stay and help to build up and carry on the business as theretofore, they entered into the following agreement: That if she would continue to live at the Townsend House and attend to the duties as she had theretofore he would convey to her one-half interest in the real and personal property of the establishment, and that she should have one-half of
the profits arising from said hotel business, and she agreed to the
22 same, and remained with him as long as he continued to occupy the
premises, taking a very active part, as housekeeper and landlady,
in carrying on the business. This agreement was not in writing, and no witnesses were present, but is testified to by both of them, and two witnesses testify to his admission of such a contract.

He took another polygamous wife during that fall, but continued, to all outward appearance, actual cohabitation with the plaintiff as his polygamous wife, on said premises, occupying the same room and the same bed, as before, until February, 1878, with the motive (as both of them testify) of preventing the public from knowing that any change had taken place in their relations.

5th. During all the time from the commencement of said hotel business, in 1866, until February, 1878, the establishment was known as the Townsend House, and was carried on in the name of defendant Townsend, and he was represented to the public by every advertising agency as the sole proprietor. The business was conducted with profit for some years, but resulted in inability to pay the debts incurred.

6th. After his purchase of said premises, and prior to the fall of 1868, defendant Townsend expended on said premises the further sum of about $16,000 in erecting buildings on said lot necessary for the business of a hotel.

7th. On October 1st, 1868, defendant Townsend borrowed from defendant Hooper the sum of $5,000, gave his note therefor, and at the same time executed a trust-deed of said premises to secure payment accordingly. On the 8th day of December, 1868, he borrowed from defendant Hooper

the further sum of $3,000, gave his note therefor, and at the same time executed a second deed of trust to secure the payment of that sum, and of the further sum of $2,000, which he might need, and which was within a few days thereafter advanced to him by said Hooper on his third promissory note. The rate of interest stipulated in said notes was twenty-five per cent. per annum. These moneys were borrowed and used
23 for the erection of buildings and improvements, now on said premises, to meet the demands of the business.

8th. On the 21st day of November, 1871, the mayor of Salt Lake City entered and paid for in the local land office the lands embraced in the town-site of said city, including the premises in controversy, pursuant to the existing town-site laws, and in trust for the several use and benefit of the occupants thereof, and the patent for said lands was issued to said mayor, in trust, on the 1st day of June, 1872. The mayor gave the requisite public notice of such entry for a period of three months, the first publication of which was on the 24th day of November, 1871.

9th. Within the time allowed to occupants to assert their claims to said lands, defendant Townsend, as occupant of said premises, applied for a conveyance thereof to him, and in due course of proceedings in the probate court of said county was adjudged to be the rightful occupant thereof, and entitled to a conveyance thereof from said mayor in execution of such trust; and thereupon said mayor, on the 1st day of May, 1873, executed and delivered to him a deed, under the corporate seal of said city, purporting to convey to him the whole of said premises in fee, in execution of said trust, but said deed was executed without witnesses.

10th. The plaintiff did not, within six months after the first publication of said notice of entry by said mayor, or at any time, make or deliver to the clerk of the probate court of said county any statement containing a description of said land and premises, or a description of the right, interest, or estate therein claimed by her, but utterly failed to make or so deliver any statement or make any claim, as an occupant or otherwise, to a conveyance of any interest therein under the town-site laws.

11th. The indebtedness of defendant Townsend to defendant Hooper on the three promissory notes, on the 24th day of September, 1873, amounted, with interest, to $12,500, and he then renewed the same by giving
24 to defendant Hooper his three promissory notes, two for $5,000 each and one for $2,500, bearing interest at the rate of one and a half per cent. per month, and payable at one year thereafter, and at the same time executed a trust-deed conveying said premises to Eldredge and Hills, trustees, with apt provisions for securing the payment of such notes according to the terms thereof.

12th. On the 18th day of September, 1875, defendant Townsend made and delivered to C. C. Cunningham, or order, his promissory note for $2,500, bearing interest at the rate of two per cent. per month, and payable at one year thereafter, and at the same time, to secure the same, executed a mortgage on said premises and on the furniture in said hotel.

13th. On the 10th day of October, 1876, defendant Townsend made and delivered to defendant Roberts his promissory note for $5,000, with interest at the rate of two per cent. per month, payable at one year, to the order of said Roberts, and at the same time, to secure the same, executed and delivered to him a mortgage on said premises and on the furniture in said hotel.

14th. On the 8th day of February, 1878, on the threat of said Cunningham to take legal steps to secure his claim against defendant Townsend, and to put the sheriff in possession of said premises, said defendant Townsend, with the knowledge of said plaintiff, executed to said Cunningham a lease of said premises for two years for a stipulated rental, and also a bill of sale of all the furniture, goods, and chattels therein belonging to said defendant Townsend, and delivered the possession of said premises and chattels to said Cunningham.

15th. On the 11th day of March, 1878, a judgment was obtained and docketed in the court against defendant Townsend and in favor of defendant Jennings for $2,802.75 and costs, $22.45, and he afterwards assigned and set over to defendant Hooper one-half thereof.

16th. On the 12th day of March, 1878, a judgment was entered and docketed in the court against defendant Townsend and in favor of
25 the Deseret National Bank for $1,336.38 debt and $72.20 costs.
Said bank assigned the same to defendant Jennings, who assigned and set over one-half thereof to defendant Hooper.

17th. The $5,000 note and mortgage to Roberts was transferred by him to defendant Jennings, who assigned and set over one-half thereof to defendant Hooper, and has received a credit on it of a part of the proceeds of sale of the said premises by said trustees hereinafter mentioned.

18th. The lease from defendant Townsend to Cunningham was, on the 21st day of February, 1878, with consent of defendant Townsend and with the knowledge of plaintiff, assigned to defendant Roberts, who, after said sale, surrendered the same to defendant Jennings.

19th. The note of $2,500 to said Cunningham, on which payments had been made, leaving a balance of $1,000 due thereon, was transferred by him to defendant Roberts on the 21st day of February, 1878, and by him transferred to defendant Jennings, who assigned and set over to defendant Hooper one-half thereof.

20th. The defendants Hooper and Jennings thus became the holders of all the liens on said property.

21st. The said mayor's deed and all of said deeds of trust and mortgages were duly recorded at or about their respective dates.

22d. Afterwards, on the 10th day of April, 1878, the sum of $16,425 was due on said three promissory notes made to defendant Hooper on the 24th day of September, 1873, and the said trustees, Eldredge and Hills, in execution of their trust in accordance with the provisions of the last-mentioned trust-deed, sold said premises to defendant Jennings (except that said Eldredge was not present at the sale and the same was conducted solely by said Hills) for $22,500, and applied the proceeds, 1st, to pay their charges, $21; 2d, to pay the amount so due to defendant Hooper; and,
3d, the balance, $6,054, toward the payment of said subsequant liens
26 pro tanto, in the order of their priority; and thereupon executed a
deed purporting to convey to said Jennings all the estate defendant Townsend held in said premises on the 24th day of September, 1873, and defendant Jennings afterward conveyed one-half thereof, undivided, to defendant Hooper.

23d. That during all their transactions with said defendant James Townsend the defendants Hooper, Jennings, and Roberts dealt with him as the sole owner of said premises, as against every one save the United

States, prior to the proceedings in the probate court under the town-site law, and as sole owner thereafter, without any actual or constructive notice of any claim of the plaintiff. That the peculiar relations existing between the defendant James Townsend and the plaintiff were not such as to be of the distinct and unequivocal kind as to be construed into giving the defendants Hooper and Jennings such constructive notice of the plaintiff's rights as would take from them the character of bona fide purchasers without notice. That although the proof shows that James Townsend acted as landlord and plaintiff as landlady, and that she was faithful and assiduous in all things, save perhaps in the management of the finances, and the duties in and about the office of the hotel—that the guests went to her for their wants and the servants looked to her for their orders and employment, and that she was, in fact, the ruling spirit about the house, and that the defendants, Hooper and Jennings, were cognizant of the fact that plaintiff was the polygamous or plural wife of defendant James Townsend—it is, nevertheless not of that grave and positive character as would throw upon defendants Hooper and Jennings the burden of inquiring into her rights, the failure to do which would take from them their character of bona fide purchasers without notice. That the fact, as shown by the proof, that both plaintiff and defendant James Townsend continued after the said contract was made between them to live together, and purposely held themselves out to all the world as husband and wife, such as occupying the same room and bed, notwithstanding the
27 knowledge of defendants Hooper and Jennings that they were living in polygamous relations, had the effect of depriving third parties, as these defendants were, of means of knowledge that plaintiff had any contract rights in relation to the property.

24th. Neither the said trustees nor the defendants Hooper, Jennings, and Roberts, nor any of them, had any notice of the claim of the plaintiff to an interest in or right to said premises until after the bringing of this action.

CONCLUSIONS OF LAW.

As conclusions of law the court doth find—

1st. That the interest which defendant Townsend held in said premises at the date of the trust-deeds, in 1868, was the subject of sale and mortgage.

2d. The conveyance by the mayor, in 1873, vested the legal title in fee of said premises in defendant Townsend, and such title was subjected to the subsequent trust-deed to secure the debt to defendant Hooper.

3d. That the failure of plaintiff to take any steps to secure the interest or estate in said premises claimed by her under the town-site law, forever barred her from the right of claiming or recovering any interest or estate therein in any court of law or equity.

4th. That the defendant Hooper, under the several trust-deeds, held the position of an innocent purchaser for a valuable consideration.

5th. That the defendants Hooper and Jennings, under the sale by the said trustees, are innocent purchasers for a valuable consideration; and that the legal title in fee to said premises was by said sale and deed vested in them, free from any trust or claim in favor of the plaintiff.

6. That the purchase of said premises by defendant Townsend,
28 and the conveyance to him by said mayor, was not in trust for the
plaintiff as to one undivided half or any other interest in said
premises.

7th. That the plaintiff is not entitled to the relief sought or to any relief in this case, and that the injunction heretofore issued herein should be dissolved.

8th. That the defendants Hooper and Jennings are entitled to a decree against the plaintiff confirming their title to the whole of said premises, and for their costs.

9th. That the bill should be dismissed as to defendants Roberts and Townsend.

Let a decree be drawn accordingly.

JOHN A. HUNTER,
Judge, etc.

(Endorsed:) Filed Nov. 20, 1879. O. J. Averill, clerk, by H. G. McMillan, deputy.

(Title.)

ELIZABETH M. TOWNSEND, PL'FF,
vs.
WM. H. HOOPER, WM. JENNINGS, BOLIVER ROBERTS, & James Townsend, def'ts.

This cause having been heard upon the pleadings and proofs of the respective counsel, and the court thereupon having made and filed its findings of fact and conclusions of law herein, now at this day the cause came on for further proceedings, and all and singular the premises having been fully considered—

It is now ordered, adjudged, and decreed:

1st. That the plaintiff, Elizabeth M. Townsend, is not entitled to the relief sought or to any relief in this cause, and that the injunction heretofore issued herein against the defendants William H. Hooper and William Jennings be, and the same is hereby, dissolved.

2nd. That the defendants William H. Hooper and William Jennings
are innocent purchasers, for a valuable consideration, of the lands and
premises in controversy in this cause, viz: That certain parcel of land or
fractional city lot, being part of lot 8, in block 68, of plat A of Salt Lake
City, in the county of Salt Lake and Territory of Utah, described by
metes and bounds as follows: Beginning at the northeast corner of
29 said lot 8 and running thence south 265 feet; thence west 10 rods;
thence north 265 feet; thence east ten rods, to the beginning corner, together with all and singular the tenements, hereditaments, and appurtenances thereon or thereunto appertaining; and that they now hold, and are entitled to hold, said lands and premises in fee, free from any and all claims of or trust for or on behalf of said plaintiff, Elizabeth M. Townsend, either in law or equity.

3rd. That the complaint and this action be, and the same is hereby, dismissed as to the defendants Bolivar Roberts and James Townsend.

4th. And that the defendants William H. Hooper and William Jennings have and recover of and from the plaintiff, Elizabeth M. Townsend, their costs of this action, taxed at $81.45.

JOHN A. HUNTER,
Judge of Third District Court.

Attest:

O. J. AVERILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

(Endorsed:) Filed Nov. 20, 1879. O. G. Averill, clerk, by H. G. McMillan, dep't.

30 In the district court for the third judicial district of the Territory of Utah.

ELIZABETH M. TOWNSEND, PLAINTIFF,
vs.
WILLIAM H. HOOPER, WILLIAM JENNINGS, James Townsend, and Bolivar Roberts, defendants.

GENTLEMEN: Take notice that said plaintiff appeals to the supreme court of the Territory of Utah from the decree or judgement of the district court for the third judicial district of said Territory rendered and entered in the above-entitled action on the 20th day of November, 1879, and from the whole thereof, and also from the order of the said district court made and entered in said action on the 5th day of May, 1880, denying a motion for a new trial, and from the whole of said order.

Dated May 6th, 1880.

Yours, &c.,

J. G. SUTHERLAND,
J. D. LOMAX,
Att'ys for said Plaintiff.

To O. J. AVERILL, Esq.,
Clerk of said District Court.
Messrs. ROSBOROUGH AND MERRITT,
WILLIAMS & YOUNG, &
SHEEKS & RAWLINS,
Att'ys for Def'ts except Townsend,
And JAMES TOWNSEND, *Defendants.*

31 (Endorsed:) Title of court and cause. Notice of appeal. Filed May 6th, 1880. O. J. Averill, clerk. After filing this notice we admit service of a copy thereof on us this 6th day of May, 1880. Rosborough & Merritt, att'ys for def't Hooper; Williams & Young, att'ys for def't Jennings; Sheeks & Rawlins, att'ys for def't Roberts; James Townsend.

32 In the district court for the third judicial district of the Territory of Utah.

ELIZABETH M. TOWNSEND, PLAINTIFF,
vs.
WILLIAM H. HOOPER, WILLIAM JENNINGS, James Townsend, and Bolivar Roberts, defendants.

Whereas the said plaintiff has appealed to the supreme court of the Territory of Utah from the decree or judgement of the district court for the third judicial district of said Territory, made and entered in the above-entitled action on the 20th day of November, 1879, and from the order of said district court made and entered in said action on the 5th day of May, 1880, denying a motion for new trial:

Now, therefore, in consideration of the premises, we, the undersigned, do undertake and promise, on the part of the appellant, to the effect that the appellant will pay all damages and costs which may be awarded against her on said appeals, not exceeding two hundred dollars.

S. E. UNDERHILL. [SEAL.]
W. L. PICKARD. [SEAL.]

33 TERRITORY OF UTAH,
Salt Lake County, ss:

S. E. Underhill and W. L. Pickard, of said county, being severally duly sworn, say, each for himself: "I am worth the sum specified in the foregoing undertaking over and above all my just debts and liabilities, exclusive of property exempt from execution."

S. E. UNDERHILL.
W. L. PICKARD.

Sworn to & subscribed before me this 10th day of May, 1880.
[SEAL.] JAS. McKNIGHT,
Notary Public.

(Endorsed:) Title of court and cause. Appeal bond. Filed May 10th, 1880. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

34 Afterwards, at a term of said supreme court begun and held at Salt Lake City on the 7th day of June, A. D. 1880, proceedings were had in said court and said cause and entered on the records of said court as follows, to wit:

35 MONDAY, *June 28th*, A. D. 1880.

* * * * * * *

ELIZABETH M. TOWNSEND, APPELLANT,
vs.
WILLIAM H. HOOPER ET AL., RESPONDENTS.
From 3d dist.

This cause coming on regularly for hearing, was argued by Arthur Brown, esq., for appellant, and J. B. Roseborough, esq., for respondents.

TUESDAY, *June 29th*, A. D. 1880.

* * * * * * *

ELIZABETH M. TOWNSEND, APPELLANT,
vs. } From 3d dist.
WILLIAM H. HOOPER ET AL., RESPONDENTS.

This cause was further argued by J. B. Rosborough, esq., also by P. L. Williams, for respondents.

WEDNESDAY, *June 30th*, A. D. 1880.

* * * * * * *

ELIZABETH M. TOWNSEND, APPELLANT,
vs. } From 3d dist.
WILLIAM H. HOOPER ET AL., RESPONDENT'.

This cause was further argued by J. G. Sutherland, esq., for appellant. Submitted and taken under advisement by the court.

36 SATURDAY, *September 25th*, A. D. 1880.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment. Present and presiding, the Hon. John A. Hunter, C. J.; present also, Hon. P. H. Emerson, A. J., and Hon. J. S. Boreman, A. J., the clerk, marshal, and and members of the bar. Court was duly opened.

* * * * * * *

ELIZABETH M. TOWNSEND, APPELLANT,
vs. } From 3d dist.
WILLIAM H. HOOPER ET AL., RESPONDENTS.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon. it is now here ordered, adjudged, and decreed that the judgement of the district court therein be, and the same is hereby, affirmed, and that respondents do have and recover of and from appellant the sum of fifty-eight and $\frac{55}{100}$ dollars costs.

Thereupon said appellant, by J. G. Sutherland, her attorney, prays the allowance of an appeal of this cause to the Supreme Court of the United
States, and that the amount of a bond to be given on such appeal
37 be fixed and counsel for respondents being present; and not objecting thereto, it is ordered that the appeal so prayed be, and the
same is hereby, allowed, and the amount of bond thereon be, and is, fixed,
at five hundred dollars.

38 And on said 25th day of September, A. D. 1880, there was filed in the office of said clerk, the opinion of said supreme court of Utah Territory, in said cause of which the following is a copy to wit:

39 The following decision was delivered on Saturday by J. S. Boreman, associate justice. Appellant's counsel gave notice of an appeal to the United States Supreme Court:

In the supreme court of Utah Territory, June term, 1880.

ELIZABETH M. TOWNSEND, APPELLANT,
vs.
WILLIAM H. HOOPER, WILLIAM JENNINGS, et al., respondents.
Appeal from the third district.

One James Townsend owned certain real estate (hotel property), and gave a deed of trust thereon to secure the payment of several of his promissory notes to respondent Hooper. The notes were not paid, and the trustees sold the trust property at public sale, in accordance with the deed, and William Jennings, one of the respondents, became the purchaser. The validity of these transactions is not questioned herein by said James Townsend, but Elizabeth M. Townsend has claimed a half interest in the property, and brought this suit to recover that interest. Judgment of the district court was for the defendants, and the motion for a new trial being overruled, the plaintiff has appealed to this court.

The appellant bases her claim to the half interest upon a secret agreement between herself and said James Townsend, whereby she was to be his equal partner in the hotel business and to own one-half of the property. This was a private, secret compact, which the parties thereto did not desire the public to know anything of, and both said James Townsend and the appellant testify they purposely sought to conceal from the public the existence of it. Judging from the evidence in this case they effectually succeeded, and not only the public generally but respondents Hooper, Jennings, and Roberts, as well as the trustees, were in total ignorance of the existence of any such agreement or of appellant's claim of interest until after the trustees' sale and the payment of the purchase-money.

Now, however, the appellant comes forward and alleges that these respondents—Hooper and Jennings, as well as Roberts—were bound in law to take notice of this secret partnership agreement, notwithstanding her and said James Townsend's efforts to conceal it, and that they obtained their interests subject to her rights. There is no pretense that said respondents had any actual notice of the agreement, but deny that her course and conduct were sufficient to notify them of its existence. The title to the property was in James Townsend; the claim for deed from the mayor under the town-site act and the deed from the mayor were in his name; the business of the hotel was carried on and advertised in his name; the relations between said James Townsend and said appellant, so far as the public were concerned, were no different after the making of the agreements from what they were before its making, and there was no change in her conduct about the hotel, so far as the public could know, after the making of agreement from what it was before its making, and the agreement itself was not of record anywhere, not even reduced to writing.

The appellant knew of these debts for some years, but did not see proper to notify the owners of the claims that she had any interest, or that she claimed any interest in the property, until after the trustees' sale and the purchase by Jennings. The fact that appellant was the polygamous wife of said James Townsend could give her no advantage nor be the basis of any claim to the property. If it served any purpose it was to aid her and James Townsend to more effectually conceal the secret partnership agreement, but she cannot claim any benefit from her own wrong.

The fact that she was the housekeeper at the hotel would give no notice to the public that she had any interest beyond that of a housekeeper. It would not lead the public to believe that she owned or claimed any interest in the property or that she was in possession of it. So far as the public was concerned she claimed no possession, either as partner or otherwise. The character of the business and her relation thereto continued after the agreement just as before it.

With all these facts in view, the respondents Hooper and Jennings and Roberts were not bound to take cognizance of the existence of the partnership arrangement between the appellant and James Townsend. The rights of the said respondents could not be affected by the agreement. They stood as purchasers for value and acted in good faith, and the fault was that of the appellant in concealing the agreement. The trustees were purchasers for value. (New Orleans C. & B. Co. vs. Montgomery, 95 U. S., p. 16.)

It is alleged that the mayor's deed to James Townsend is not valid because it is not witnessed and the acts preceding it are not shown. It would signify nothing to the appellant, it would seem, whether the deed was valid or not, as she claims through James Townsend, by contract with him. But the deed is not invalid. No witnesses were necessary. The statute points out how such deeds shall be made and acknowledged. (Comp. Laws, 1166, sec. 1.) And it was prima facie evidence that the probate judge had done all that was necessary to its execution. Cofield vs. McLelland, 16 Wallace, 335.)

If it were alleged and true that the interests of Jennings, Hooper et al., respondents, arose out of a fraud, or were, in effect, a fraud upon the appellant, she has rested too long upon her rights, and they are now barred by the statute of limitations. (Comp. Laws, p. 366, 1110.) Besides, there was no objection at the time to the introduction of the deed in evidence.

We therefore see no error in the judgment of the court below, or in the order overruling the motion for a new trial. The judgment and order overruling the motion for a new trial are affirmed, with costs.

(Endorsed:) Filed Sept. 25th, 1880. E. T. Sprague, clerk.

40 And on the 4th day of October, 1880, was filed in the office of said clerk a bond on appeal, of which the following is a copy, to wit:

41 Know all men by these presents that we, Elizabeth M. Townsend, principal, and W. L. Pickard and W. W. Chisholm, sureties, all of Salt Lake City, Utah, are held and firmly bound unto William Jennings, William H. Hooper, Bolivar Roberts, and James Townsend, in the full and just sum of five hundred dollars, to be paid to the said William Jennings, William H. Hooper, Bolivar Roberts, and James Townsend, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately at a term of the supreme court of the Territory of Utah, in a suit pending in said court on appeal from the district court for the third judicial district of said Territory, a decree against the said Elizabeth M. Townsend made and rendered in said district court, with costs 42 taxed at $, was affirmed, with costs taxed at $58.55, and the said Elizabeth M. Townsend having appealed from the said decree of affirmance to the Supreme Court of the United States, and her appeal having been allowed by the said supreme court of the Territory :

Now the condition of the above obligation is such that if the said Elizabeth M. Townsend shall prosecute her said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

W. L. PICKARD. [SEAL.]
W. W. CHISHOLM. [SEAL.]
ELIZABETH M. TOWNSEND. [SEAL.]

Signed, sealed, and delivered in presence of and approved by
JOHN A. HUNTER,
Chief Justice of the Territory of Utah.

43 TERRITORY OF UTAH,
County of Salt Lake, ss :

W. L. Pickard and W. W. Chisholm, of said county, being severally duly sworn, say, each for himself: "I am a resident of said county; am worth the sum mentioned in the foregoing bond as the penalty thereof over and above all my just debts and liabilities, exclusive of property exempt from execution."

W. L. PICKARD.
W. W. CHISHOLM.

Sworn and subscribed before me this 4th day of Oct., 1880.
[SEAL.] JAS. MACKNIGHT,
Notary Public.

(Endorsed :) Filed October 4th, 1880. E. T. Sprague, clerk.

44 TERRITORY OF UTAH,
County of Salt Lake, ss :

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the appeal prayed and allowed as hereinbefore stated, do herewith return to the Supreme Court of the United States a transcript of the pleadings, findings, and judgment in and of the district court of the third judicial district of said Territory in the case of Elizabeth M. Townsend, plaintiff, vs. Wm. H. Hooper, Wm. Jennings, James Townsend, and Bolivar Roberts, defendants, filed in said supreme court of Utah Territory on the appeal of said cause, also of the proceedings judgement, and opinion of said last-named court thereon, and of the bond on the appeal thereof to the Supreme Court of the United States; and I do hereby certify that said transcript hereto attached is a true, full, correct, and complete copy of the original pleadings, findings, and judgement in and 45 of said district court, and of the said proceedings, and judgement and opinion in and of the supreme court of Utah Territory in the cause above described, and of the bond on appeal thereof, and endorsements on each and all of them, as appears by the records in my office.

Witness my hand and the seal of said supreme court of Utah Territory, at Salt Lake City, this 5th day of October, A. D. 1880.

[SEAL.] E. T. SPRAGUE,

Clerk of Supreme Court of Utah Territory.

(Indorsement on cover:) No. 132. Elizabeth M. Townsend, appellant, vs. William H. Hooper, William Jennings, James Townsend, and Bolivar Roberts. Utah Terr'y sup. court. Filed 16th October, 1880.]

109-504

OFFICE SUPREME COURT U.S.
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JAMES H. McKENNEY, Clerk.

109-504

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 132. October Term, 1883.

Elizabeth M. Townsend,
Appellant,
vs.
Wm. H. Hooper,
Wm. Jennings,
James Townsend and
Bolivar Roberts.

Appeal from
the
Supreme Court
of the
Ter'y of Utah.

PLAINTIFF'S ARGUMENT.

Involving the rights of a plural wife, resident in Utah Territory, to real estate—hotel property—under a verbal contract with her by her Mormon husband, the property having been sold on execution for his debts.

JAMES H. MANDEVILLE,
OF COUNSEL.

WASHINGTON, D. C.
R. BERESFORD, PRINTER, 523 SEVENTH STREET.
1883.

IN THE

Supreme Court of the United States.

No. 132. October Term, 1883.

Elizabeth M. Townsend, *Appellant,* *versus* Wm. H. Hooper, Wm. Jennings, James Townsend and Bolivar Roberts.	Appeal from the Supreme Court of the Terr'y of Utah.

PLAINTIFF'S ARGUMENT.

Nature of the Action.

The plaintiff as tenant in common filed her bill of complaint April 29, 1878, against the defendants, to recover an undivided one-half interest in the Townsend House hotel property, in Salt Lake City. The cause was tried by the court without a jury, and it found for the defendants. The Supreme Court of Utah Territory affirmed the judgment; hence her appeal to this Court.

Grounds of Appeal.

IT WAS ERROR FOR THE SUPREME COURT OF UTAH TO HOLD:

1ST. THAT THE VERBAL AGREEMENT OF JAMES TOWNSEND TO GIVE ELIZABETH TOWNSEND, THE PLAINTIFF, ONE-HALF INTEREST IN THE PROPERTY, DID NOT CREATE FOR HER A VALID TITLE.

2D. THAT THE DEFENDANTS WERE *bona fide* PURCHASERS FOR VALUE AT THE TRUSTEES' SALE ON EXECUTION WITHOUT NOTICE OF PLAINTIFF'S RIGHTS.

Statement of Plaintiff's Case.

This statement has been prepared from the findings of the district court, principally, and from the admissions contained in defendants' answer and supplemental answer.

James Townsend bought the premises in controversy March 18, 1865, for about $6,000, and in the years 1872 and 1873 he bought adverse claims against it, paying over $3,000 more. Before the fall of 1868 he expended $16,000 in buildings on the premises.

October 1, 1868, Townsend borrowed from defendant, Wm. H. Hooper, $5,000, and secured his note therefor by a trust deed on the property. On December 1, 1868, he borrowed $3,000 more, giving a second note and a second deed of trust, which also secured $2,000 additional, upon receiving which he gave his third note a few days thereafter. The annnal interest on these loans was 25 per cent. These moneys were also put into buildings and improvements on the premises.

November 21, 1871, the lands embraced in the townsite of Salt Lake City, including the disputed premises, were entered by the mayor in trust for its several inhabitants, and a patent was issued to him as trustee June 1, 1872. Within the proper time Townsend applied for a conveyance of the premises, and having been declared by the probate court of that city a rightful occupant, the mayor executed and delivered to him, on May 1, 1873, under the corporate seal of the city, a deed in fee for the property.

Townsend married a lawful wife in 1828, and continued to live with her until she died in 1870. The defendants well knew them and their marital relations long prior to 1868. In 1858 he entered into a polygamous marriage with Elizabeth Murray, the plaintiff in this case, according to the rites and tenets of the Mormon Church, of which they were members, as were also the defendants, and who at that time had notice of the actual polygamous relations between James and Elizabeth Townsend.

In the fall of 1866 Townsend went upon the premises, and began to keep a hotel called the Townsend House, taking with him his lawful wife, and Elizabeth his plural wife. The plaintiff took an active part in conducting the business, the lawful wife being then old and taking no part in the management of the house.

Townsend continued actual cohabitation with Elizabeth as his plural wife on said premises until the fall of 1867, when he concluded to take a second polygamous wife, to which plaintiff objected, and threatened to return to England.

In order to induce her to stay and help carry on and build up the business as theretofore, they entered into this agreement:

> "*If she would remain at the Townsend House and attend to the duties as she had done, he agreed to convey to her one-half interest in the entire property, and give her one-half the profits of the business.*"

This contract she accepted, and remained with him under the same as long as he continued to occupy the premises, taking a very active part in carrying on the hotel business.

The agreement was not in writing, and no witnesses were present when he declared it, but James and Elizabeth Townsend both testified to it, and two witnesses at least testified to his admission to them of such a contract.

Although he took a second polygamous wife that fall, 1867, he continued to all outward appearance cohabitation with the plaintiff, as his polygamous wife, on the premises, until February, 1878, and he and Elizabeth both testified that although they did not in fact cohabit together, they kept secret from the public the change in their domestic relations. From 1866 to February, 1878, the hotel was known as the Townsend House. It was carried on in his name and he was represented sole proprietor.

The indebtedness of Townsend to Hooper on the three promissory notes amounted, with interest, on September 24, 1873, to $12,500. Townsend renewed the same and gave three other notes, two for $5,000 each, and one for $2,500, payable in one year, and with interest at 18 per cent. a year; and he executed a trust deed to Eldredge and Hills to secure his notes.

Townsend also borrowed September 18, 1875, from C. C. Cunningham $2,500 for one year at 2 per cent a month, and October 10, 1876, $5,000, from Bolivar Roberts, one of defendants, for one year at 2 per cent. a month, and he executed to each a separate mortgage on the premises to secure said loans.

February 8, 1878, on Cunningham's threat to put the sheriff in possession of the premises, Townsend executed to Cunningham a two years' lease of the hotel, and a bill of sale of all his furniture, goods and chattels.

In March, 1878, two judgments were obtained against James Townsend: one by defendant Jennings for $2,802.75 debt and $22.45 costs, the other by the Deseret National Bank for $1,336.38 debt and $72.20 costs, which last judgment was afterward assigned to the defendants. Townsend's note to Cunningham, on which there was due a balance of $1,000, was assigned to defendant Roberts. The two year's lease was also transferred to Roberts February 21, 1878, with Townsend's consent.

April 10, 1878, more than $16,000 were due from Townsend to Hooper. Accordingly Hill and Eldredge, trustees, on that day sold the premises at public auction to Jennings for $22,500. Defendants' supplemental answer states that *plaintiff, while the proceeds of sale were in the trustees' hands, laid claim to all moneys over and above the amount necessary to satisfy the debt due to defendant Hooper.* But executions having issued on the judgments obtained in March, which were placed in the marshal's hands on the day of sale, a levy was made upon the surplus proceeds to satisfy those judgments.

The trustees on April 13, 1878, conveyed the premises with all the estate that James Townsend had therein on September 24, 1873, when he executed his deed to the trustees, to defendant Jennings, who, on the said 13th of April, conveyed an undivided one-half of his interest in the estate to defendant Hooper. After this sale Roberts transferred his lease to Jennings.

In consequence of plaintiff's claim to the surplus moneys, defendants brought their action in court on April 20, 1878, against the plaintiff, including Hill and Eldredge, trustees, who held the surplus moneys, to marshal the assets, establish the priorities and determine the claims of the respective parties to the fund. The Court held that the two mortgages and the two judgments became a lien on the surplus moneys in the order of their respective dates; and the other liens it established in the following priority:

1st. $1,299.67 due on the note to Cunningham.
2d. $6,540 due on the $5,000 note to Roberts.
3d. $2,824.45 due on the Jennings judgment.
4th. $1,408.58 due on the bank's judgment.

The defendants paid all these liens; wherefore they claim in their supplemental answer that the plaintiff is still indebted to them a balance of $6,018.70.

As a matter of fact not clearly appearing from the record, the plaintiff ever has retained her possession in the premises to this day.

Argument.

There is no dower in Utah. A woman acquires no interest in real estate in that Territory by the act of marriage. Under the laws of Utah the husband owns the property, controls it as he wills, and may convey it without his wife's signature. Marriage there in no way impairs a husband's rights as to property. All our American ideas of dower, partition, equal descent, and woman holding land in fee simple apart from her husband, are unknown to the laws of Utah. Everything a woman possesses at marriage becomes absolutely the property of the husband.

James Townsend had a lawful wife who died in 1870. Any conveyance by him before her death would have passed the fee to the property, for under the Mormon laws of Utah she had no property rights to be extinguished by his conveyance.

This condition of married woman's rights exists in no other State or Territory within the United States. It is contrary to American common law, although possibly not contrary to the Constitution of the United States, unless the Court shall hold that the fourteenth amendment has a bearing upon this matter in the several Territories, they being exclusively within the jurisdiction of the Government of the United States.*

But in this case the plaintiff is not a wife. Though by the rites and tenets of the Mormon Church she is now the plural wife of James Townsend, nevertheless, she is not by the recognized laws of this country invested with any of the rights or affected by any of the disabilities which attend the marriage relation.

The plaintiff actually lived and cohabited with James Townsend from 1858 until 1867, and she ostensibly lived and cohabited with him from 1867 until 1878. According to the recognized laws of the country she was ever after 1858, and is now, an unmarried woman, because James Townsend in 1858 had living a lawful wife to whom he was married in 1828; and after her death in 1870 he never married the plaintiff in the sense in which Americans, who are not Mormons, view the marriage relation. Therefore, with Elizabeth and James Townsend it was simply cohabitation without marriage.

It was competent for James Townsend to enter into a contract with the plaintiff in 1867, because then she was an unmarried woman

His contract with her, then, was a verbal contract. Was it good? If yes, then equity will follow the property and treat James Townsend's deed, obtained from the mayor of Salt Lake City on May 1, 1873, just the same as if he had procured it in the joint names of James Townsend and

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*State *v.* Gibson, 36 Ind., (1871,) 402.
Lomas *v.* State, 3 Heis., (Tenn. 1871,) 312.
Frasher *v.* State, 3 Tex. App., (1877,) 263.

Elizabeth M. Townsend, instead of in his name alone. If the verbal contract was good, then his obtaining the deed as he did without her name therein as an equal joint owner, created a resulting trust in her favor. Although he may not so have intended, nevertheless, his procuring the deed to himself was, in equity, a fraud upon her rights.

Elizabeth was not James Townsend's wife. In law she never has been his wife. But openly and notoriously she was the landlady of the hotel, to the exclusion of both the lawful wife and the other plural wife, sustaining this relation after the contract was executed for more than ten years. The defendant Hooper, at the time of his loan, well knew that plaintiff Elizabeth was not and could not be the lawful wife of James Townsend. These defendants should have considered her relations to him otherwise than as a Mormon wife, knowing that any United States court would declare her an unmarried woman, and entirely qualified to enter into any contract with James Townsend or with any other person, although she was "living with him" as a married woman.

James *vs.* Holmes, 4 DeGex, Fisher and Jones' Reports, (English, 1862,) 469.

I. THE VERBAL CONTRACT.

It was made between James and Elizabeth Townsend in 1867, and is valid, because in Utah there was no statute of frauds to inhibit such a contract. The statute of frauds was not adopted there until February 20, 1874.

Perry on Trusts, (3d Ed.,) Section 75; and authorities there cited. Laws of Utah, 1874, page 27.

In the States where the statute of frauds has not been adopted, it has been determined that trusts in lands can be created and proven by parol. This is settled law. As defendants failed to set up the statute of frauds in their answer, they waived it.

Perry on Trusts, Sections 75, 137.
Carpenter *vs.* Harris, 72 Ills., 1874, 14.

The verbal contract gave plaintiff a present right to an undivided one-half interest in the hotel property. After 1867 James and Elizabeth Townsend were tenants in common.*

II. RESULTING TRUST.

Upon the verbal contract and subsequent purchase there arose by operation of law a resulting trust. The contract made her equal in voice and authority in the hotel business, and under it she shared losses as well as profits. The building up of the business was due to their united efforts. James Townsend had been proprietor of the Salt Lake House for eight years before the purchase of the Townsend House, the consideration for which, as he testified on the trial, was earned by the plaintiff equally with himself, not only the $3.30 paid to the mayor of Salt Lake City in 1873, for the legal title, but as well the $10,000 paid for the possessory title in 1866. When he paid this money he occupied a *fiduciary* relation to the plaintiff. Her contribution must be presumed to be an equal portion of the purchase money.

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* This verbal contract was established by the testimony of James and Elizabeth Townsend. The witness, Covington, testified that in 1873 he heard Townsend admit that plaintiff had equal rights and authority with him in the management of the house.

The witness Cunningham, who was steward of the Townsend House from 1871 to 1874, and in charge of its wines and liquors from then until 1878, testified that both James Townsend and the plaintiff were its proprietors, and both acted equally in all transactions about the hotel. She made her claims in the presence of the witness and Townsend, who never denied her rights and who always acquiesced in her management of the house. Witness testified:

> "I proposed to the plaintiff to lease the hotel. She told me she would consider the matter and let me know. Finally she answered me that she would lease the house, her name being silent in the business; that Mr. Townsend must execute the lease. He was then out of town. She sent for him, and upon his arrival he consented to the arrangement. This occurred in February, 1878."

This witness also testified that in 1873, he and one Burnham, run the hotel for Townsend and plaintiff at a net profit of $27,000.

As to his *lease* Cunningham testified:

> "I took the mortgage because it covered James Townsend's interest in the personal property in the Townsend House, and also his interest in the real estate which I deemed sufficient at the time to secure me for the amount of money I let him have personally. As plaintiff had always acted as silent partner, and she gave her consent to the lease, I did not deem it was necessary for her to sign it. The amount of my loan to James Townsend was $6,500. I knew the Townsend House property was mortgaged to a large amount—some $14,000—when I took my mortgage."

Shoemaker *vs.* Smith, 11 Humphreys (30 Tenn., 1850,) 81.

Where upon a purchase of property the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, the parties being strangers to each other, (as was the fact in this case) a resulting trust immediately arrises from the transaction, and the person named in the conveyany will be a trustee for the party from whom the consideration proceeds.

Perry on trusts, sections 126, 127.

The Girard Hotel estate in Philadelphia, or Edwards *vs.* Edwards, 39 Pa. State, 1861, 369.

The plaintiff moved in five years after the acquiring of the legal title to secure her rights, and four years after she first learned of an encumbrance of the property. She did not sleep upon her rights. There was no adverse holding before she declared them, and not until then should any statute of limitations apply.

This resulting trust cannot be rebutted here upon the ground that James Townsend was under any obligation to provide for Elizabeth as his wife, for she could not be his wife.

Perry on trusts, section 143.

James *vs.* Holmes, 4 DeGex, Fisher and Jones' reports, (English, 1862,) 469.

III. DEFENDANTS HAD NOTICE OF PLAINTIFF'S RIGHTS.

Was not ten years' public service of an unmarried woman as landlady of a hotel legal notice, or at least constructive notice, to the defendants that a sale of the hotel property under a trust deed made by James Townsend alone, to satisfy the debts contracted solely by him—for Elizabeth testified that she only knew of his indebtedness in 1874—would pass only the interest that he owned? especially so, if his half of the property was worth more than twice the aggregated debts, principal and interest, even at 25 per cent. a year, which stood against the property! for the hotel estate in 1872 was worth $150,000; he was offered that sum for it; while all the debts for which it was sold would not exceed $30,000. The hotel, and improvements and furniture, cost $150,000. The furniture cost $40,000 and was appraised second-hand at $32,000, pending the indebtedness. The profits of the hotel for the year 1873 were $27,000. While the record here does not show these facts, still, they were clearly proven at the trial.*

It is not to be denied, that as between James Townsend and the plaintiff there existed a valid contract which invested her with an equitable interest in the property. Further, that she and Townsend were in joint possession of it, and that openly and notoriously, and with full knowledge of the defendants, she managed and controlled the property for many years—almost to the same extent as if she had been sole proprietor. As aptly found by the district court:

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*It was also proven that the plaintiff put over $4,000 of her separate property into the hotel to pay off its current debts, shortly before the lease to Cunningham. She paid one White for meat $500; turned over her cattle for $1,300 to pay Teasdel for provisions and dry goods; paid Dinwoody $700 for furniture and sacrificed a house to pay him, which cost her $1,400, and of which sum she brought $1,200 with her from England; and that she mortgaged another house with the proceeds of which she bought $300 worth of dry goods for the hotel. These various acts are substantial evidence of her ownership in the property; they operated as notice of ownership.

> "the guests went to her for their wants, and the servants looked to her for their orders and employment.', "*She was, in fact, the ruling spirit about the house.'* Record, page 17.

Such open possession and control, not as agent, but as principal, was in law notice to every one dealing with the property that she had some rights therein. The duty was thereby imposed upon the defendants to ascertain what were her real interests; any neglect by them to make full inquiry was at their peril.

It is evident that these Mormon defendants purchased the property assuming Elizabeth to be James Townsend's *wife*, according to the laws of the Mormon Church, and that, as wife, she had no interest in it. Having assumed this much, it was only natural further to assume, that James Townsend's trust deed was sufficient, under the Mormon laws of Utah, to vest the property wholly in the trustees. But the authorities will bear out counsel's proposition that Elizabeth Townsend's *possession as manager*, having equal voice and authority with James Townsend for a period of ten years, was not thus to be ignored. Such long continued possession and authority was constructive notice, and sufficient to arrest these defendants in their determination to acquire this large and valuable estate until they had learned what were plaintiff's rights; and this it was not difficult to do. William Jennings was not a *bona fide* purchaser of this property for value without notice.

Hart *vs.* The Farmers and Mechanics Bank, 33 Vt., (1860,) 252, 268.

IV. PLAINTIFF'S RESULTING TRUST NOT SUBJECT TO EXECUTION.

James Townsend was a mere trustee of one half of the property. He held the bare legal title for the plaintiff. Therefore an execution and sale against him transferred none of her estate.

Smith *vs.* McCann, 24 Howard, (1860,) 398.

A naked legal title which is held in trust cannot be sold upon an execution at law.

Baker *vs.* Copenbarger, 15 Ill., (1853,) 103.
Campfield *vs.* Johnson, 1 Halsted's Ch., (N. J., 1845,) 245.
Huntt *vs.* Townshend, 31 Md., (1869,) 336.

The authorities are divided upon the question whether a beneficiary under a resulting trust, which is plaintiff's standing, has an estate subject to execution. But we plead *not* where there is a legal estate which is more than four times enough to satisfy the debts.

It was in evidence that Townsend in the year 1873 had $7,000 in hand and, knowing that he could easily raise the balance, he went to Hooper, then a banker of great means, to discharge his indebtedness; but Hooper's investment was too good to be disturbed, and therefore he induced Townsend to keep the money, for which act, as a matter of gracious accommondation, he reduced the interest from 25 per cent. to 18 per cent. a year.

V. ONLY JAMES TOWNSEND'S PROPERTY WAS LIABLE FOR HIS DEBTS.

Judgment and execution liens attach to the defendant's *real* instead of his apparent interest in property. A sale made under a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached.

Freeman on Executions, (1876,) Section 335, and authorities cited.

The purchaser at an execution sale takes his title subject to such liens and *equities* as it was subject to in the hands of the defendant, unless the purchaser can show that he is a purchaser in good faith without notice, actual or *constructive*, of the existence of such lien or equity.

Freeman on Executions, Section 336.

The defendants can only claim to stand in the shoes of James Townsend; they succeeded only to his rights and are affected by all the equities against him.

Walke *vs.* Moody, 65 N. C., (1871,) 599.
Polk *vs.* Gallant, 2 D. & B., (N. C., 1839,) 395.
Richardson *vs.* Stillinger, 12 G. & J., (Md., 1842,) 477.
Riddle *vs.* Bryan, 5 Ohio, (1831,) 56.
Rutherford *vs.* Green, 2 Ired., (N. C., 1842,) 121.
Oberthier *vs.* Stroud, 33 Texas, (1870,) 522.
Blankenship *vs.* Douglas, 26 *Ib.*, (1862,) 225.

The constructive notice to defendants at the sale, of plaintiff's rights, from her long possession, prejudices the purchaser's title. Notice by possession for ten years was equivalent here to registry notice.

Byers *vs.* Engles, 16 Ark , 1855, 554.
Webster *vs.* Maddox, 6 Me., (1830,) 256.
McLouth *vs.* Rathbone, 19 Ohio, (1850,) 21.
Krider *vs.* Lafferty, 1 Wharton, (Pa., 1835,) 303.
Hood *vs.* Fahnestock, 1 Pa. St., (1845,) 470.

It is a universal principle that a prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or equity. The single circumstance of not proceeding on it until a subsequent lien had been obtained and carried into execution, has never been considered as such an act.

Rankin *vs.* Scott, 12 Wheat., (1827,) 179.

The plaintiff had more than a lien—she had an *interest* in the property. Jennings could not succeed to her interest held by the defendant.

Schall's Appeal, 40 Pa. St., (1861,) 170.

If this action shall prevail the plaintiff is entitled to one-half the rents and profits of the property since the trustee's sale.

Freeman on Executions, Section 349.

VI. CIRCUMSTANCES THAT SHOULD OPERATE TO SAVE PLAINTIFF'S RESULTING TRUST.

When the sale was made, in 1878, there was nearly enough of personal property to satisfy the debts. When $150,000 of property, real and personal, is sacrificed at a forced sale to satisfy debts held by two millionaires—as were Hooper and Jennings—for $30,000, and bid in by them, perhaps the authority and the silent, permeating power here of the Mormon Church may suggest itself to the Court as a means which prevented this great property from being sold under a healthy competition for anywhere near its market value.

Freeman on Executions, Section 297.

Does the Court believe that $150,000 of productive property in a growing city will sell for only $30,000, unless bidding, by some sort of arrangement or understanding, is prevented?

Underwood *vs.* McVeigh, 23 Grattan, (Va., 1873,) 409.
Kerwer *vs.* Allen, 31 Iowa, (1871,) 578.
Fleming's Heirs *vs.* Hutchinson, 36 *Ib.*, (1873,) 519.
Abbey *vs.* Dewey, 25 Pa. St., (1855,) 413.

Is there any reasonable doubt but that Hooper had this sale made for his own benefit? Under the circumstances was Jennings anything more or less than his attorney? for on the same day that Jennings received a deed from the trustees he conveyed to Hooper. The court will observe that the entire consideration was paid down at the trustees' sale, in order (probably under the advice of their able counsel) that they might thereby be protected as *bona fide* purchasers for value without notice! A stranger would hardly have been as hasty as were the defendants. From these two circumstances a strong presumption arises that they did know of plaintiff's claim.

Rorer on Judicial Sales, section 574.
Swaze *vs.* Burke, 12 Peters, (1838,) 11.
Michoud *vs.* Girod, 4 Howard, (1846,) 503.
Hopton *vs.* Swan, 50 Miss., (1874,) 545.

When the ruinous interest exacted of 25 per cent. a year and the inadequacy of price obtained, is taken into consideration, in connection with the plain purpose of these defendants to make a fine speculation in business out of this sale, is it too much to ask this Court sitting as the highest court of equity in the land, ruling justice between the high and the low, the rich and the poor, to take into consideration the *morality* of this transaction?

Smith *vs.* Randall, 6 Cal., (1856,) 47.
Benton *vs.* Shreeve, 4 Ind., (1853,) 66.
Taylor *vs.* Eckford, 11 S & M. Rep., (Miss. 1848,) 21.
Freeman on executions, section 309, and authorities there cited.

To give Elizabeth Townsend her property is not to wink at a man and woman living together as unmarried persons, and to sustain property relations between them, for *her rights are founded upon a valid contract.* After 1867 her relations to her Morman husband were purely of a business character.

Story's Equity Jurisprudence, (12 Ed., 1877,) section 296.

The *secret agreement*, as the lower court is pleased to term it, was made in 1867. At that time James Townsend could have had no intention of defrauding creditors, for he was free from debt. There was no Gentile element in Utah in 1867. The patronage of the hotel, dependent wholly upon the Mormons, might have been seriously impaired if not ruined, had Townsend, who was a zealous Mormon, openly alienated one-half of his property to a *woman* to hold as her separate estate, in direct violation of the laws of the Mormon Church. Any Mormon who is suspected of being disloyal or unfaithful to the church is subjected to a punishment which can be appreciated only by those who have had to pay the penalties that are inflicted by the church. The case of Thomas McBride, recently before this tribunal, may serve to enlighten the Court upon this subject. When he apostatized from the Church it attempted to take from him all his earthly possessions, and for safety to life he fled to the mountains of Idaho. But it was not the " secret partnership agreement " that the defendants were to notice; it was her *possession* as an unmarried woman, and her equal voice and authority as a manager of the house. Her possession was sufficient to put a prudent man upon enquiry, especially after she had put out, in various transactions, $4,000 of her own money to pay the current debts of the hotel.

As Utah is a Territory, subject to Federal instead of State authority, the property rights growing up there, which are impaired by Mormon influence or Morman law, should be strengthened.

Our laws are adapted to all forms of society. They should be administered in this case with wisdom, and with an enlightened understanding of the great problem of government existing in Utah, for the solution of which it is necessary to blend the action of all the great departments of Federal authority. A victory by these defendants will be another triumph for the Mormon Church. If these defendants win here I shall exclaim with Job:

> " The tabernacles of robbers prosper, and they that provoke God are secure; into whose hand God bringeth abundantly."

The Administration in power since 1861 has professed enough; but it has accomplished nothing toward the removal of the Mormon excrescence which Stephen A. Douglas, twenty-five years ago, proclaimed to be "*the loathsome* *ulcer of our body politic.*" We are led to ask, from the apathy manifested, can anything be expected? Let us watch and pray.

Meanwhile the institution of Mormonism flourishes; and its emissaries, in defiance of all national authority, obtain now their converts—not only from Europe, but from the heart of the Southern States, for during the present year 1,000 souls have emigrated to Utah from Georgia, Mississippi and Tennessee.

It is prayed that the judgment of the supreme court of Utah Territory may be *reversed*, and that a decree may be rendered by this Honorable Court entitling the plaintiff to one-half of the property in controversy.

James H. Mandeville

109-504

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Supreme Court of the United States.

OCTOBER TERM, 1883.

ELIZABETH M. TOWNSEND, APPELLANT,

vs.

LEWIS S. HILLS, JAMES T. LITTLE, THOMAS G. WEBBER, THOMAS W. JENNINGS, AND WILLARD YOUNG, Executors of the Estate of William H. Hooper, deceased, and WILLIAM JENNINGS, BOLIVAR ROBERTS, AND JAMES TOWNSEND.

ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT.

J. G. SUTHERLAND,
J. R. McBRIDE,
ARTHUR BROWN,
Counsel for Appellant.

Star Print, Romney Block.

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ASSIGNMENT OF ERRORS AND BRIEF FOR APPELLANT.

ASSIGNMENT OF ERRORS.

The appellant insists that the judgment or decree below is erroneous on the following grounds:

1. The alleged contract between the plaintiff, the appellant, and defendant James Townsend, was found by the Court, and that the plaintiff had performed her part of it so as to entitle her to one-half of the property in controversy as between them, and that they jointly occupied the premises under the agreement.

2. The Court below erred in holding that the plaintiff's rights were barred by her omission to file statement in the Probate Court, claiming for the property under the Townsite act.

3. The Court below erred in holding that the defendants Hooper and Jennings were purchasers in good faith; for, first, that defense is not made in their answer; second, the title which defendant Townsend held to the property which was the subject of security and purchase was only an equitable or inchoate title; third, there is no finding that any value was paid; fourth, the deeds taken purport to convey only all of James Townsend's estate; and, fifth, these defendants bought with notice of plaintiff's rights, she being in the actual possession of the property.

BRIEF.

I.

The case stated by the plaintiff is found by the Court to be true in fact, as to defendant Townsend; and it is sufficient as to him to entitle her to the relief she asks.

It is alleged in her complaint that she and defendant Townsend went into possession of the property in 1867, and thenceforth until 1878, jointly occupied and improved it, and managed a hotel thereon, under a distinct and express understanding with him that she had equal right and interest therein with him; that they so occupied as two persons for their mutual and equal benefit; that they occupied under that agreement and understanding when defendant Townsend obtained a deed from the Mayor of Salt Lake City, under the townsite law. The land is alleged to have been government land at the beginning of the joint possession; and that it was entered and purchased by the Mayor of said City on the 21st of November, 1871; that he conveyed to the defendant Townsend on the 1st of May, 1873.

It is insisted, therefore, that when he had obtained that deed, any title thus obtained, as to an undivided half of the property, beneficially enured to the plaintiff; that defendant Townsend took such title subject to her rights; that at once he was, and ever since he has been, while it was in his power, under a trust as well as a contract obligation to convey to her.

The agreement found by the court and stated in the 4th finding, and the performance by the plaintiff as thus also found, establish the fact of the alleged joint occupation of the premises, under this agreement, that she and defendant Townsend had and was to have an equal interest in the property, that she was to derive it from him, and that he agreed to convey it to her.

The agreement between them was valid, no statute then existing in Utah requiring such a contract to be made in writing. The plaintiff was personally on the property at the time the agreement was made. She was thenceforth in actual possession of the subject of the purchase; and the contract recognized that possession, and not only contemplated, but required its continuance.

The plaintiff, by that agreement, and her performance of her part of it, obtained an equitable right and title to the half which was the subject of her purchase; his conscience was bound, and he was under a legal obligation, to yield and convey that interest to her; it was such an equitable right in the premises as she could enforce in a court of equity. This proposition is too elementary to require the citation of authorities.

The contract between them related to the property, and necessarily embraced all the title he could then or afterwards at any time, during the pendency of the contract, assert; for they had in view the permament enjoyment and complete ownership of the property.

There is no element of illegality in the contract. The polygamous relation between these parties began anterior to any legislation on that subject by Congress, under the peculiar teachings of the church of which all the parties are members. It has no significance except to explain how such a joint occupation could be maintained in a Utah community, for business purposes. Neither the inception nor the continuance of that relation was the basis of or any inducement to the contract. Its consideration is found and stated by the Court in the fourth finding; it is obviously sufficient, and it is legally unexceptionable.

Were James Townsend the sole defendant resisting the relief sought by the plaintiff, her case would be sound both on the facts and the law. She would manifestly be entitled to a decree for a half interest in the property described in the Complaint, unless precluded by operation of some arbitrary statutory rule by which he is absolved from the obligations imposed by his contract. It was held by the trial Court that such a rule was in force, and to be found in the provisions of the Territorial act relating to townsites. To that subject we now invite attention.

II.

The Court below erred in holding that the plaintiff's rights were barred by her omission to file a statement and claim for the premises in the Probate Court under the townsite act.

See Act of Congress 14 Stat. 541.
Utah C. L. 380, Sec. 3.

It is respectfully submitted that the bar declared in this Utah Statute has no relevancy whatever to this case. It merely precludes such relief upon the constructive trust recognized in such cases as Stark vs. Starrs, 6 Wall. 402. It is there held that, "where one party has acquired a legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title."

The statute in question bars this remedy where the trust arises merely from one person acquiring a legal title to property to which another has a better right, and the latter has not availed himself of the proceeding required by the statute. The bar was applied to such a case in Cofield vs. McLelland, 16 Wall. 331, and in Stringfellow vs. Cain, 99 U. S. 610. There is no instance of its being applied in any other.

Where there is no privity between the parties involving an actual trust or obligation, but they claim throughout independently and adversely, this statute requires them severally to file their claim, and to settle their rights by a proceeding instituted as this statute directs in the Probate Court. But where there is an unexecuted contract to convey, or a fiduciary relation, imposing a duty on the party filing, to file the claim in another's name, or in his own name as trustee, this statutory bar manifestly can have no application. A vendor filing a statement for the land would not be absolved from his personal obligation to convey, though his vendee had omitted to file any statement; nor would an agent or trustee occupying in a fiduciary capacity be permitted to procure the adjudication of a townsite lot to himself and set up the bar, and thus make his fraud successful. As between parties who do not claim adversely, the filing by one does not affect any antecedent relation so as to require the other to make an adversary filing, in order to preserve rights resulting from that relation. This bar can not be invoked to relieve any party from the ordinary consequences of a failure to fulfill a contract or duty to convey, existing prior to his filing, or to shield him from the consequences of filing in his own name, if in so doing he violated any trust or duty to another.

This statute authorizes the statement to be filed with the Clerk of the Probate Court by an agent or attorney. If such agent or attorney should make the filing and procure an adjudication for his own benefit, it would be monstrous to enable him to protect himself in such a wrong by maintaining that it was his principal's duty to make the filing in his own name, it being solely the fault of the perfidious agent or attorney that such duty had not been performed. It can not be supposed that such consequences were intended by the law-maker.

The agreement provides for a joint occupancy and it was a continuing one. After the 1st day of May, 1873, when defendant Townsend obtained the Mayor's deed, as well as before, the contract between him and the plaintiff was in force; for an indefinite time in the future it was executory. Their subsequent joint occupation is to be referred to and governed by that contract. Under it the plaintiff was entitled to one half of the property, and defendant Townsend bound himself to convey it to her. By acquiring title from the Mayor, or any other source, he merely qualified himself to perform his agreement. If they were merely partners in the property and business prior to the filing, defendant Townsend could not by a filing in his own name exclude his co-partner or co-tenant.

Van Horn vs. Fonda, 5 Johns Ch. 388.
Lee vs. Fox, 6 Dana 171.
Fogg vs. Mann, 2 Sumn. 486, 522.
2 Lead Cas. in Eq. (ed. 1859) 96.

III.

The Court below erred in holding that defendants Hooper and Jennings were *bona fide* purchasers.

These defendants can have no better standing than James Townsend, and they have succeeded only to his rights, unless they are *bona fide* purchasers, and are entitled to be protected as such. There are insuperable objections to the defence in that character.

1. They have not set up that defence in their Answer with the facts necessary to support it.

They have not in their Answer denominated themselves purchasers in good faith, nor claimed for that reason to be protected. They take issue on the case stated in the Complaint against James Townsend, and put their defence on the ground that the alleged contract was never made, or if made was concocted between the plaintiff and defendant Townsend since he has become insolvent, to defraud his creditors generally, and after he had obtained credit as the owner of the entire property. This defence is negatived by the findings. They establish that the contract was made in 1857, and that the possession of the parties to it had its inception before the debt to Hooper was contracted. The failure of the plaintiff to proclaim her contract is no objection to it.

Hyde vs. Powell, 47 Mich. 156.

It is not found that she had any notice of the loans made to Townsend.

Hooper and Jennings deny on information and belief the alleged contract, her occupancy and possession, that she ever set up or pretended any claim whatever to the premises; and they add that "these defendants never had any notice whatever that she claimed or pretended to have any interest therein until after said Jennings had bought said premises, nor until the commencement of this action," saying nothing in this denial about payment. But there is a tacit admission throughout the Answer that the plaintiff was personally upon the premises during all the transactions involved in the case. Hooper's loan was entirely made while the land belonged to the government, and, therefore, certainly not on the faith of the ownership of the fee. It is not stated when the notes originally given were payable, nor that they were cancelled at the giving of the notes and trust deed in September, 1873. It does not therefore appear by the Answer that there was any new consideration for the notes and security last given.

There is no denial that these defendants knew of the plaintiff's actual presence on the property; and no denial that they were informed of this contract. Their denial that, "said plaintiff and said James Townsend, as occupants of said premises, or otherwise, mutually acknowledged each other's *equal* rights or interests in said premises on the 21st day of November, 1871, or at any other time," is a literal denial, a negative pregnant; or at most is a legal deduction from the general conduct, relations and mode of managing the business, and can not be accepted as a denial of the fact of knowledge that a contract existed between the plaintiff and defendant Townsend by which she was to have *some* interest in the property. The other denial of notice, above quoted, might be true, though they severally had knowledge or information of the making of such a contract.

It does not appear by the pleadings that defendant Hooper obtained or negotiated to obtain a trust deed of the perfect legal title; nor that Jennings bought the property on any assurance of such a title.

The Complaint states the property to have been government land up to November 21st, 1871, when the Mayor of Salt Lake City entered the tract including it as a townsite. It states that on the 1st of May, 1873, the Mayor executed a deed to James Townsend conveying the premises in controversy in fee. The answer does not controvert these facts, but alleges that "on the 24th day of September, 1873, said indebtedness to said defendant Hooper, amounted $12,500 principal and interest, and said James Townsend, *who had before that time received said Mayor's deed of said property, and held and possessed the same in fee simple*, in order etc., renewed his obligations, by executing three promissory notes etc., and at the same time, in order to secure the payment of the same, executed and delivered to Lewis S. Hills and Horace S. Eldridge, trustees, a trust deed whereby he conveyed said premises to them in trust, etc."

It afterwards alleges a sale of "said premises at public auction to said defendant Jennings, for $22,500, * * * which was paid by him to said trustees (stating no date of payment) * * * and the said trustees in the final discharge of said trust * * * on the 13th day of April, 1878, conveyed said premises, and all the estate which said James Townsend had therein on the said 24th day of September, 1873, to said Jennings." The pleadings, therefore, represent Townsend as having a conveyance in fee from the Mayor, based on an entry in the land office. There is no statement in the pleadings on either side that a patent had been issued. There is no averment that can be construed as affirming that Townsend had, or represented himself as having, any other title than such as passed by the Mayor's deed in the absence of a patent, or an adjudication to him of the land by the Probate Court. There is, consequently, no ground for these defendants to contend that they, or either of them, bargained for the perfect legal title. They can not, however, claim protection as *bona fide* purchasers against the plaintiff's earlier equitable title, unless they allege a purchase of the legal title, for value and without notice.

Boone vs. Chilles, 10 Pet. 177, 211.
Shirus vs. Craig, 7 Cranch 48.
Vattier vs. Hind, 7 Pet. 252, 271.
Kramer vs. Arthur, 7 Pa. St. 165.
Chew vs. Burnett, 11 Serg & R. 393.
Dupont vs, Wertheman, 10 Cal. 354, 368.
Reynolds vs. Harris, 14 id 680.

The finding that there was an adjudication in the Probate Court, and that a patent had been issued is outside and beyond the issue made by the pleadings and can have no effect.

2. The deed from the Mayor, as found by the Court below, was insufficient for want of subscribing witnesses, to operate as a conveyance of the legal title to defendant Townsend.

The Territorial Statute, under which the Mayor's deed was required to be given, provides: " Deeds of Conveyance for the same shall be executed by the Mayor of the city or town under the seal of the corporation, when the entries shall be made by the corporate authorities of such town or city, * * * and in all cases said deeds shall be acknowledged before and certified by an officer competent under the laws of this Territory to take acknowledgements of deeds of conveyance of real estate."

Utah C. L. pp. 378, 380, Sec. 1.

By an act concerning transfer of land claims and other property, approved January 18th, 1855, (see *id.* p. 253,) it is provided in Sec. 2, that " To be valid a transfer *must be witnessed by two or more competent persons*, be acknowledged before some person authorized to take acknowledgements," &c.

Deeds under the townsite act are transfers within that statute, for it was the only general statute on that subject. Deeds must be under seal; and the townsite act requires the mayor's deed to be executed under the seal of the corporation. It is a transfer of real estate and therefore must be witnessed; and both the act relating to transfers and that regulating the execution of mayor's deeds of lots in townsites, require the deeds to be acknowledged.

A deed not witnessed, when witnesses are required, and especially when expressly required as a condition to its validity, can not, at most, operate to convey more than an equitable title.

Clark vs. Graham, 6 Wheat 577.
French vs. French, 3 N. H. 234.
Rundlet vs. Hodgman, 16 id. 239.
Brown vs. Eastman, id. 588.
Cram vs. Ingall, 18 id. 613.
Courcier vs. Graham, 1 Ohio, 330.
Patterson vs. Pease, 5 id. 190.
Merwin vs. Camp, 3 Conn. 35.
Crane vs. Reeder, 21 Mich, 24, 61.
Clark vs. McEloy, 11 Cal. 160.
Dupont vs Werthman 10 id. 368.

3. The trust deed executed by James Townsend, Sep. 24th, 1873, for Hooper's security, and the deed by the trustees, April 13th, 1878, to Jennings, as found by the court below, are not sufficient to support the defense of bona-fide purchase. These deeds contain no covenant of warranty, and can not estop the grantor from asserting title in another, or an after acquired title in himself. It is not enough that there is a deed to defendants, and even in terms of grant broad enough to carry the legal title if held by the grantor; it must contain a covenant for title express or implied.

Oliver vs. Piatt 3 How. U. S., 333, 410.
May vs. LeClaire, 11 Wall, 217, 232.
Villa vs. Rodriguez, 12 id. 323, 338, 339.

Dickerson vs. Colgrave, 100 U. S, 678.
Mona vs. Best, 62, Mo. 496.
Bragg vs. Poulk, 42 Me. 502.

The deed to Jennings is stated in the 22d finding, and the grant is described by saying that the trustees "executed a deed purporting to convey to said Jennings *all the estate defendant Townsend held in said premises on the 24th day of September*, 1873, and defendant Jennings afterwards conveyed one half thereof, undivided, to defendant Hooper."

As defendant Townsend at the date stated, had only a beneficial interest of one undivided half, the grantee can claim no more under the deed, as against the plaintiff who was then and still is the equitable owner of the other half.

4 There is no finding that Hooper and Jennings paid value for the land, within the sense of the law protecting bona-fide purchasers.

Hooper had no right to such protection on account of the loan, for when it was made the title to the property was confessedly imperfect and inchoate. The paramount title was in the government. It is found that in 1868, defendant Townsend borrowed of Hooper $10,000, at twenty-five per cent. interest per annum, that he gave notes and trust deeds of the premises, but the period of credit is not found. See 7th finding.

In the 11th finding the indebtedness for that loan is stated but not that it was due. On the giving of the new notes and trust deed it is not stated that the former notes and security were canceled; therefore it must be assumed that they were still held, and Townsend bound to the original rate of interest. Taking a new note and security—not a higher security, would not merge or pay the debt as it formerly existed.

Matthews vs. Ellsworth, 33 Wis. 488.
Bank of U. S. vs. Daniels, 12 Pet. 32.
Middlesex vs. Thomas, N. J. Ex. 30.
Peter vs. Beverly, 10 Pet. 532.
Archibalo vs. Argall, 53 Ill. 307.
Doebling vs. Loose, 45 Me. 150.
Kermeyer vs. Newby, 14 Kans. 164.
Brown vs. Olmstead, 50 Cal. 162.
Wilbur vs. Jernegaw, 11 R. I. 113.

The last notes were payable in a year, and specified a reduced rate of interest. There was, however, no reduction of interest if the creditor still held, as we insist it must be assumed he did, the old notes. Nor can it be held that there was any extension of time, there being no finding that the debt by the original terms of the loan was or would be due at a date earlier than that fixed for payment of the new notes. No extension of time or forbearance is found. Every enlargement of time is not a forbearance of the creditor; it is such only when granted at the request and for the benefit of the debtor. Eighteen per cent. interest, or a greater rate, is sufficiently remunerative to a creditor to justify the inference, if any inference is to be drawn in the absence of a finding, that any enlargement of the period of credit, if such enlargement can also be inferred without a finding, was at the request and for the benefit of the lender. It does not appear that the debt secured on one-half the property, or Townsend's beneficial interest, was inadequately secured, and the evidences of value contained in the findings indicate that the security was ample. The money borrowed was expended in improvements on the property, (see 7th Finding) $9,000 had been paid originally for it, and $16,000 had been expended in the erection of buildings on it prior to the loan from Hooper.

A new consideration was necessary to supply the necessary element of value paid as to Hooper.

Dusenbury vs. Hulbert, 59 N. Y. 541.

Jennings first connects himself with the property by becoming the purchaser at the sale under the trust deed. But there is no direct finding that he did anything, except to make a conveyance to Hooper. The finding is, otherwise, of what was done by the trustees;—they sold the premises to Jennings for $22,500, and applied the proceeds, Unless this imports actual payment there is no finding that the purchase price was paid. The sale was at auction, and on a bid by Jennings the property was struck off to him. Can the finding be made to mean more? He claimed subsequent liens on the property for more than the surplus, and the trustees assumed to account for the surplus proceeds upon them, and thus between Hooper (who shared with Jennings the purchase and the subsequent liens) and Jennings, the entire sum bid was absorbed. It was doubtless a mere payment on paper, and no actual payment in fact made. The proceeds were for Hooper, except the part applied on Jennings subsequent securities, and they may have been provided to be paid at a future day. The finding does not warrant the conclusion of present actual payment or payment before actual notice. Union Coal Co. vs. Young, 1 Whart. 431. Juvenal vs.

Jackson, 2 Harris 519. Findings of a court are considered like a special verdict. No facts not found can be taken by inference or intendment.

Utah C. L. pp. 448-451, secs. of Code 175, 180, 187.
People vs Wells, 8 Mich. 104.
Burk vs. Webb, 32 Mich. 180.
Trudo vs. Anderson, 10 Mich. 367.
Blake vs, Davis, 20 Ohio 231.
Knickerbocker M. Co vs. Hall, 3 Nev. 194.
Hann vs. Field, Litt. Sel. Cas. 376.
Wallingford vs. Dunlap, 14 Pa. St. 31.
Thayer vs. Society of U. B., 20 id. 60.
Barnes vs. Sabron, 10 Nev. 219.
Sisson vs. Barratt, 2 N. Y. 406.
Bank of Alexandria vs. Swan, 4 Cranch C. C. 136.

4. Defendants Hooper and Jennings bought with notice of the plaintiff's rights, she being in actual possession of the premises.

The findings state as a fact that plaintiff and Townsend were personally on the premises after the making of the contract between them in the fall of 1867, to February 1878, during which time a hotel called the Townsend House was kept; the business therein was carried on in the name of defendant Townsend, the plaintiff "taking a very active part as housekeeper and landlady in carrying on the business." "James Townsend acted as landlord and plaintiff as landlady; * * she was faithful and assiduous in all things, save, perhaps, in the management of the finances and the duties in and about the office of the hotel, * * the guests went to her for their wants, and the servants looked to her for their orders and employment; * * she was in fact the ruling spirit about the house." She remained with defendant Townsend from the time of making the contract until their business closed in February, 1878.

The contract being found, and that the plaintiff performed her part, which consisted in service on the premises in building up and conducting the hotel business therein; the contract assuring her a half interest in the property and in the profits of the business, her presence on the property and in the performance of her duties, was, in fact and in law, the possession of a part owner and partner. She was there, in the enjoyment of her purchase and of the fruits of ownership, exercising not the control of a superior servant, but the dominion which was her right as one of the heads of the establishment. She was in the situation daily to enjoy immediately the entire subject of her purchase or contract. Her presence on the premises under such circumstances, and in such capacity, was as completely possession as though a deed had been made and recorded. She was not held out of possession to perform some precedent condition, on a promise then to be admitted. The contract contemplated posession from the beginning; contemporaneous performance of the requirement of the contract, which was its consideration, and enjoyment of half the profits, and equal ownership with Townsend of the property.

It remains to be considered, in view of the particular nature of her possession, and the other facts found explaining her personal relations to Townsend whether her possession, consistent as it was with her rights, was such actual, open and visible possession as would affect a purchaser from Townsend with notice of her rights. If it could so affect a purchaser, notice is a legal deduction and conclusion. The finding as a fact that the defendant had no constructive notice can have no force or effect; like all other legal conclusions, found in a judicial decision, it can have no force, except as supported by adequate facts found.

The 23d finding is a curious compound; as a whole, it is like a paragraph of a judicial opinion, in which certain premises are stated, and, on a process of reasoning, a legal result is arrived at. This division of the findings, however, can only be treated as a finding of facts; that is what it professes to be, and only what is matter of fact in it can be considered. The law regulating the procedure required the findings of fact and conclusions of law, to be separately stated. Utah C. L. p. 449, Sec. (1405) 180. Therefore the argument and legal conclusions, being out of place, should be eliminated.

The 24th finding should be construed accordingly; that is, as merely negativing actual notice. If the other facts found warrant the legal conclusion that the defendants were put upon inquiry by the plaintiffs' possession, the findings could then be harmonized. The conclusion that the defendants were or were not affected by constructive notice, should have been stated among the conclusions of law. Transferring all such conclusions to their proper place, the findings establish the fact of the plaintiff's possession, and that defendants, Hooper and Jennings, had no actual notice. There is no finding that actual inquiry was made, and if the possession was such that a prudent man, about to purchase, should have made inquiry of her, the defendants are constructively notified of what they would have learned had the inquiry been made, and the want of actual notice would be immaterial.

Mayor, etc., vs. Williams, 6 Md. 235.

Converse vs. Blumrich, 14 Mich. 120.

It is well settled, as a general rule, in the jurisprudence of this country, as well as of England, that actual possession is notice, because it is the duty of one about to purchase real estate to ascertain by what right those in possession occupy.

2 Lead. cases in Eq., Part I (ed. 1877) 180.

When another is in the visible possession, if he should without inquiry interfere, and interrupt the possession by a purchase of the estate, it would afford a presumption of a fraudlent intention. And it is upon this principle of an interference with visible rights of others, that the presumption of law arises that the second purchaser conducts fraudulently towards the first when he in possession at the time of the second purchase. Mathews vs. Demerritt, 22 Me. 316. There is some conflict of decision as to the effect of joint possession of the vendor, and the party claiming an equitable interest the notice of which depends on such possession. But each case is much controlled by its own peculiar circumstances, and the principle is generally conceded, that notice will be imputed to a purchaser where it is a just inference from visible facts; in other words, the duty to make inquiry exists when there is an occupancy which ought to attract the attention of an honest and prudent buyer, as an occupancy based upon some right. It is not necessarily decisive in favor of this defence that the purchaser who would avail himself of it has bought of a person in possession, and who appeared on the face of his deeds or the record to have the title, if the party claiming the equitable interest was also in possession. The possession of the latter should have the effect of notice, though his possession is not exclusive, if he sustains no such known relation to the apparent owner as so fully accounts for his presence that it would not occur to a cautious man, viewing the premises for the purpose of ascertaining how they are occupied, to make any inquiry of him. If there is such possession as should attract attention, or any other fact known sufficient to put the purchaser upon inquiry, he will be chargeable with notice of all that such inquiry actually made would disclose. He has no right to refrain on any inference from such possession, or the particular knowledge which puts him upon inpuiry, that the equitable interest is of a particular sort. He will do so at his peril; for he will purchase subject to the actual rights of the party of whom actual inquiry should have been made.

Boggs vs. Anderson, 50 Me. 160.
Coari vs. Olsen, 91 Ill. 273.
Kerr vs. Kingsbury, 39 Mich. 150.
Twiss vs. George, 33 id. 253.
Woods vs. Farmere, 7 Watts 382.
Grimstone vs. Carter, 3 Paige 421.
Baldwin vs. Johnson, Sax. (N. J.) 441.
Daniels vs. Davidson, 16 Ves. 253.
Russell vs. Swazey, 22 Mich. 235.
Matthews vs. Demerritt, 22 Me. 312.
Rice vs. Melaney, 41 Ioma 395.
Pringle vs. Dunn, 37 Wis. 449.
Buck vs. Holloway's Devisees, 2 J. J. Marsh 164, 180.

Even possession by a grantor, after he has made a deed and it has been recorded, will be evidence of his equitable rights. Grimshaw vs. Carter, Supra. Metropolitan Bank vs. Godfrey, 23 Ill. 579. Pell vs. McElroy, 36 Cal. 268. Russell vs. Swatzey, 22 Mich. 236. The minor children of the apparent owner living with him on the property as members of his family, would not be treated as having such possession as would be notice; so of servants. Some cases may be found which place the wife in the same category, owing to the husband's rights in her property at common law, and her legal identity with and subordination to him.

See Thomas vs. Kennedy, 24 Iowa 397.
Iowa Loan & T. Co. vs. King, 58 id. 598.

But since the property rights of married women have been enlarged by statute, and it can no longer be presumed that they have no separate property, Ross vs. Ross, 47 Mich. 185, their possession should be notice as fully as the possession of any other person who is *sui juris.*

McKee vs. Wilcox, 11 Mich. 358.
Ely vs. Gridley, 27 Iowa 376.

The plaintiff had, as stated in the Answer, neither the rights nor the disabilities of a wife, and her precise relation to the defendant Townsend was known to the defendants. This knowledge prevented them from mistaking her for a servant. Her relation was anomalous, except in this locality. The law affords no guide as to what inference shall be drawn from the joint occupation of premises by a man and woman so associating. It does not afford any pre-

sumption that a plural wife who is "without the rights or disabilities of a wife" has not the motive which animates all adult persons to provide for themselves. Where the law mak~~s~~s no provision for e
them, it is more in accord with the general experience to assume that they have excercised their rights to contract for their own welfare. Hence, a possession held by them should be presumed to be based upon some right, rather than that it is by sufferance, so as to excuse all inquiry.

J. G. SUTHERLAND,
J. R. McBRIDE,
ARTHUR BROWN,
Counsel for Appellant.

109-504

OFFICE SUPREME COURT, U.S.
FILED
NOV 23 1883
S H. McKENNEY, Clerk

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM. 1883.

No. 132.

ELIZABETH M. TOWNSEND, Appellant,

vs.

LEWIS S. HILLS, JAMES T. LITTLE, THOMAS G. WEBBER, THOMAS W. JENNINGS and WILLARD YOUNG, Executors of the Last Will and Testament of William H. Hooper, deceased; WILLIAM JENNINGS, BOLIVAR ROBERTS and JAMES TOWNSEND, Respondents.

BRIEF FOR RESPONDENTS.

P. L. WILLIAMS,
LEGRAND YOUNG,
Counsel for Respondents.

SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM. 1883.

No. 132.

ELIZABETH M. TOWNSEND, Appellant,

vs.

LEWIS S. HILLS, JAMES T. LITTLE, THOMAS G. WEBBER, THOMAS W. JENNINGS and WILLARD YOUNG, Executors of the Last Will and Testament of William H. Hooper, deceased; WILLIAM JENNINGS, BOLIVAR ROBERTS and JAMES TOWNSEND, Respondents.

STATEMENT AND BRIEF OF RESPONDENTS.

STATEMENT OF THE CASE.

The plaintiff by her bill of Complaint states that in the year 1866 she and the defendant James Townsend, went into the actual possession of the premises in question, which are situated in the City and County of Salt Lake, Territory of Utah, and described by metes and bounds, and have continued in such possession ever since.

That at the time they went into possession, plaintiff was the plural wife of defendant Townsend, according to the rites and tenets of the Mormon Church, of which they were members, she having been united to him in that relation in 1858, he having at the same time a former and lawful wife, with whom he also lived and cohabited; but in 1870, or before that time, plaintiff, from a repugnance to polygamy, ceased to cohabit with said Townsend as a wife, and has not done so since. They jointly occupied and improved said property and managed a hotel therein, called the Townsend House. She was and continued to be an occupant of said premises in her own right, and as such, had an equal right and interest therein with him, and which he conceded. They occupied, managed and improved said property with that distinct and express understanding.

The plaintiff and said James Townsend were occupants of said premises as two persons, for their mutual and equal benefit, and had such possession and right of possession on the 21st day of November, 1871; and as such rightful occupants, mutually acknowledging each other's equal interest, they continued so in possession of said premises and to manage said hotel until the 9th day of February, 1878, since which date they have continued in possession by occupying, in said hotel, a suite of rooms, the hotel being managed under a lease from said defendant Townsend, first by one Charles C. Cunningham, and after the 1st of March, 1878, by defendant Roberts, and later by him and said defendants Hooper and Jennings.

That said premises are included in the townsite of Salt Lake City, subject to entry, and on the 21st day of November, 1871, in fact entered at the United States Land Office, at said city, by the Mayor of said city, in trust for the occupants thereof, under the act of Congress approved March 2d, 1867, entitled "An Act for the Relief of the Inhabitants of Cities and Towns upon the Public Lands," and the act of the Territory of Utah of February 17th, 1869, prescribing rules and regulations for the execution of the trust arising under said act of Congress; and on the day of the said entry, by reason of the said plaintiff and the said James Townsend's rightful occupancy of said premises they were, as to said premises, persons; and the plaintiff, as to a half interest therein, was one of the persons for whose relief said act of Congress was passed, and they were exclusively entitled to a conveyance from the Mayor of said city, as trustee, of the said premises, in fee, on paying for the same, and complying with the said rules and regulations. Plaintiff was aware, in a general way, that occupants of land in said entry were entitled to purchase the same, but was not informed of the particular time and manner prescribed for making such purchase and obtaining such deed. She relied on defendant Townsend to give her the necessary information, and to counsel her as to what steps should be taken to preserve her rights and to procure the legal title to her half of said property.

On the 1st day of May, 1873, while the plaintiff and said James Townsend were still in such actual occupancy of said premises, said Townsend obtained a deed to himself alone from the Mayor of said city, conveying the entirety thereof to him in fee. That he obtained said deed without consultation with her, without her knowledge and consent, and she was not informed thereof until a subsequent year. When it came to her knowledge she requested him to convey to her her said half interest, and he promised to do so. She did not press him for a conveyance at that time on account of her great confidence in him, but she often did subsequently; he uniformally admitted her right to one-half of said property, and promised to convey it to her, but never did.

She insists that under the said act of Congress, and her said agreement and understanding with said James Townsend, she is still entitled to an undivided half of said property; that upon his obtaining a deed therefor as aforesaid, a trust binding upon him resulted in her favor for the said one-half interest.

She has never relinquished, conveyed or incumbered her interest, nor suffered her right thereto to become impaired or prejudiced.

That defendants Hooper, Jennings and Roberts claim some interest in said premises adversely to plaintiff, as purchasers or otherwise, but their rights are only such as they have questionably derived from Defendant Townsend, with notice of plaintiff's said possession and occupancy of said premises, and of her consequent rights, and subject thereto.

PRAYER.

Judgment and decree of the Court that the purchase of said premises by Townsend from said Mayor, May 1st, 1873, was a trust for the plaintiff as to one undivided half thereof; that the claims of the other defendants have no validity or effect as to said plaintiff's half interest, and that the defendants Hooper, Jennings and Townsend, be required to convey the same to her, and that their possession be declared to be in subordination to her title.

Defendants Hooper and Jennings answer jointly, denying all the allegations of the complaint, except: first—that plaintiff was the plural or polygamous wife of defendant Townsend; second—that the premises in controversy were within the townsite of Salt Lake City, subject to entry under said act of Congress, and in fact entered as alleged; third—that the defendant Townsend obtained a deed from the Mayor as trustee, conveying the whole of said premises to him in fee.

The said defendants further answering the complaint allege that they are now the owners of the said lands and premises, have the possession and right of possession thereof, setting out the facts showing such title and possession.

They plead a long possession and claim to the premises by themselves and their grantors adversely to all persons, and also a special bar of plaintiff's right under the act of the Legislature of Utah providing rules and regulations for executing the trust arising under the Townsite Act of Congress.

(See Answer of said defendants, pages 4 to 8, inclusive, of Transcript of Record.)

Defendant Roberts answered, disclaiming any interest in the said premises.

The defendant James Townsend failed to answer.

There is a supplemental complaint for provisional relief, which is answered by defendants Hooper and Jennings, but no questions now to be considered arise upon them

The findings of fact, conclusions of law and decree are found in the Record, pp. 13 to 19.

An appeal was taken to the Supreme Court of the Territory of Utah by the plaintiff, and on the 25th of September, 1880, that court affirmed the judgment and decree of the lower court. (Record, p. 21.)

The opinion of the court, delivered by Associate Justice Boreman, is contained in the Transcript of Record, pp. 21 and 22.

The finding of the agreement between the plaintiff and defendant James Townsend, specified in the fourth finding of fact by the court, (Transcript of Record, p. 14,) is not within any issue made by the pleadings or tendered by the complaint.

The complaint bases plaintiff's right to relief wholly upon her individual occupancy under the Townsite Act of Congress.

In determining the case, this finding should be wholly excluded from consideration.

The polygamous relation between the plaintiff and James Townsend, although entered into before there was any legislation by Congress on that subject, was illegal and void.

Bishop on Mar. and Div., Vol. 1, Sec. 296, *et seq.*

Indeed, the legislation of Congress on the subject of polygamy in the Territories, does not assume to deal with the question of the polygamons relation between the parties, but to provide a punishment for the act of entering into that relation.

The defendant, Townsend, having, as the plaintiffs knew when she married him, as well as at the time of entering into the secret contract found—a lawful wife, with whom he was living, any contract, based in whole or in part, on the consideration that she should continue in such relation, was immoral and void, and such as a court of equity will not enforce.

She having held herself out to the world as the wife of Townsend, she is estopped from denying the assumed fact, and from founding a claim on a different status, although the relation was illegal and void.

Divoll *vs.* Leadbetter, 4 Pickering, 220.

The debt on which the property was sold arose from money borrowed and used to improve the property and to promote the business engaged in jointly, as appellant claims, by her and defendant Townsend. Thus she is assuming to be a tenant in common and partner, under a confessedly secret contract, claiming the advantages and at the same time repudiating the corresponding liabilities of such relation.

The plaintiff is estopped from making the claim now urged by reason of her silence and acquiescence while the defendant Townsend, was dealing with the property as his own, and obtaining credit thereon.

There is no pretense that she was not in fact fully informed as to his dealings in this regard. All deeds and mortgages were recorded promptly (twenty-first Finding of Fact), and she was thereby charged with constructive notice, also of their existence under the laws of the Territory.

See Neslen *vs.* Wells 104 U. S. 428, where the substance of these statutes is set out, commented upon and interpreted.

Yet she never makes known her claim to either of the defendants Hooper, Jennings or Roberts. (Twenty-fourth finding.

Upon the general principle of equitable estoppel by conduct, silence or acquiescence, we cite:

Bigelow on Estoppel, 434.
McNeil *vs.* Tenth Nat'l Bank, 46 N. Y., 325.
Gregg *vs.* Wells, 10 Ad. and E , 90.
Niven *vs.* Belknap, 2 Johnson's Rep'ts, 573.
Chapman *vs.* Chapman, 59 Penn., 214.
Wendell *vs.* VanRensaller, 1 Johns. Ch., 344.
Town *vs.* Needham, 3 Paige, 545.

The rule is equally binding on a meretorious equity founded upon a private agreement for a valuable consideration.

Kesner *vs.* Trigg, 8 Otto, 50.
Carey *vs.* White, 9 Lansing, 1.

The third section of the act of the Legislature of Utah, approved February 17th, 1869, prescribing rules and regulations for the executions of the trust arising under the Townsite Act of Congress is in the following language, viz:

"SEC. 3—That each and every person, or association, or company of persons, or corporation claiming to be the rightful owner of possession, occupant or occupants, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall, within six months after the first publication of such notice, in person, or by his, her or their agent or attorney, sign a statement in writing, containing an accurate description of the particular parcel or parts of land in which he, she or they claim to have an interest, and the specific right, interest or estate therein, which he, she or they claim to be entitled to receive, and deliver the same to the clerk of the probate court of the county in which such town or city is situated, and the clerk of said court shall enter such statement in a book to be kept for that purpose, and file and preserve the same in his office, noting the day of filing. The filing of which statement shall be considered notice to all persons claiming any interest in the lands described therein, of the claim of the party filing the same; and all persons failing to make and deliver such statement within the time limited in this section shall be forever barred the right of claiming or recovering such land, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity; *Provided*, That when good cause is shown why such statement could not be filed within the time herein specified, the judge may extend the time not exceeding one year from the first publication of said notice."

The plaintiff having failed to make or file the statement required by this statute, she is barred. (See tenth Finding of Fact, p. 15 Transcript of Record.

Cofield *vs.* McClelland, 16 Wall, 331.

The respondents Hooper and Jennings were *bona fide* purchasers for a valuable consideration and without any notice of plaintiff's claim. This is a necessary result of the findings.

Hooper loaned $10,000 which was used in improving the property, and took deeds of trust to secure the same. A renewal of the security was subsequently given and that too after Townsend had received the deed from the Mayor.

On the 10th of April, 1878, $16,425 was due Hooper on this loan. The property was sold to Jennings for $22,500, and the money was applied in payment of this debt and the balance to the discharge of subsequent liens.

It is expressly found by the court that neither of the said defendants had any notice of plaintiff's claim until after the institution of this suit.

It is urged by appellant's counsel that her possession charged the respondents with notice of her right.

Appellant never had possession. She went upon the premises with Townsend as his wife, and was there a year before the secret agreement was entered into. Her subsequent residence there was impressed with this continued character, and the more strongly for the reason that they continued "purposely to hold themselves out to all the world as husband and wife."

McMahon *vs.* Griffing, 3 Pick. 149.

Possession of lands, in order to operate as notice to purchasers, must be open, notorious, unequivocal, and of such a nature as to put a purchaser on his guard, instead of misleading him.

LeNeve *vs.* LeNeve, Leading Cases in equity, Vol. 2, by Hare & Wallace, pages 163 to 167, where the authorities are collated.
Carey *vs.* White, 7 Lansing, 1.
Kesner *vs.* Trigg, 8 Otto, 50.

The act of the Legislature of Utah before referred to, prescribing rules, etc., contains in the first section the following provision, viz: "Deeds of conveyance for the same shall be executed by the Mayor of the city or town under the seal of the corporation, when the entries shall be made by the corporate authorities of such city or town; and by the judge of probate when the entry shall be made by such judge, and in all cases said deeds shall be acknowledged before and certified by an officer, competent under the laws of this Territory to take acknowlments of deeds of conveyance of real estate."

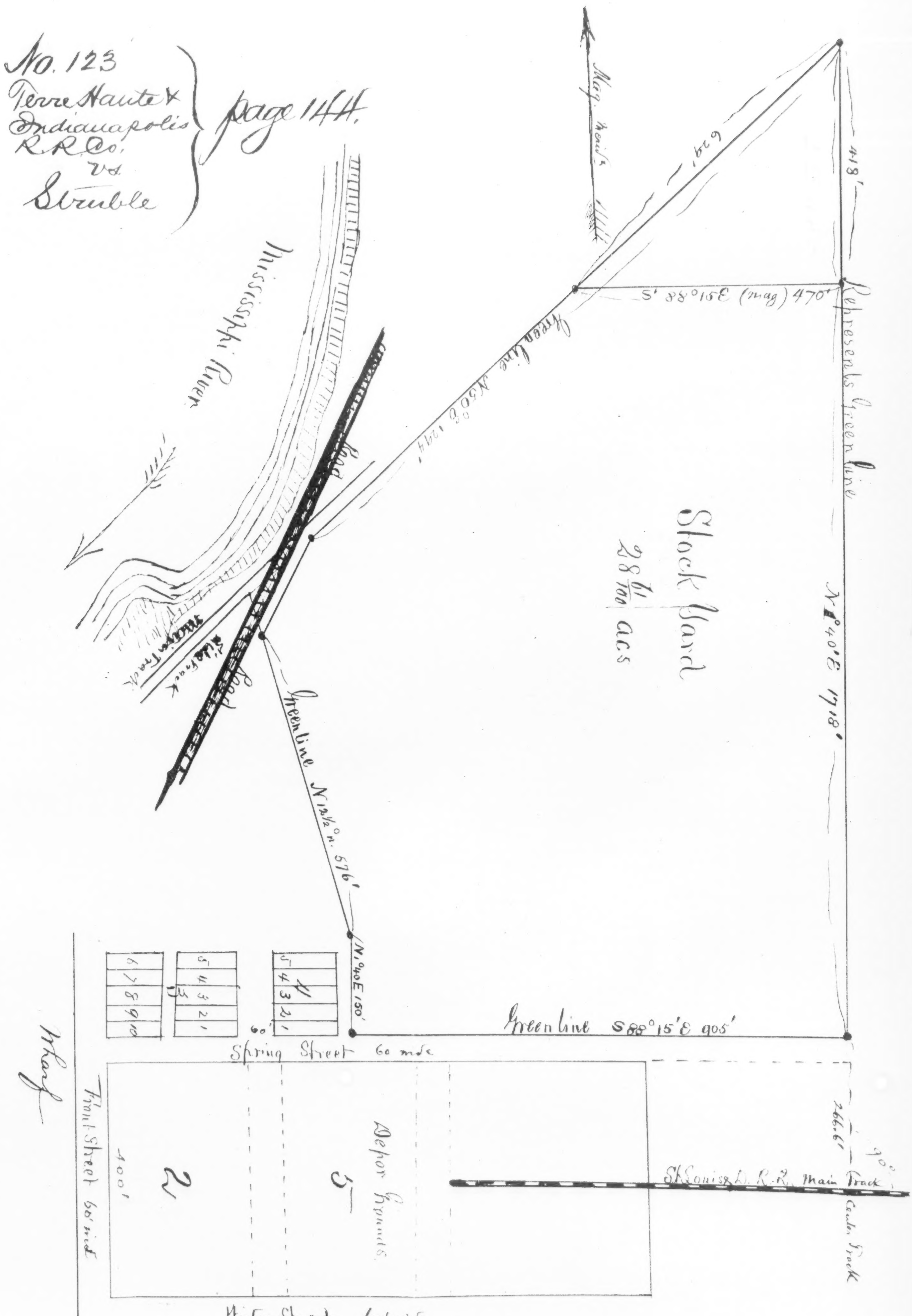
It is not requisite therefore that the Mayor's deed should be attested by a witness. But if this were not so, plaintiff having alleged legal title in Townsend, which was admitted, she is precluded from controverting the fact.

And furthermore, the frame of the complaint as well as the prayer discloses that the purpose is to compel these respondents and Townsend to convey the legal title to plaintiff—an impossibility if the legal title has never passed from the Mayor.

P. L. WILLIAMS,
LEGRAND YOUNG,
Counsel for Respondents.

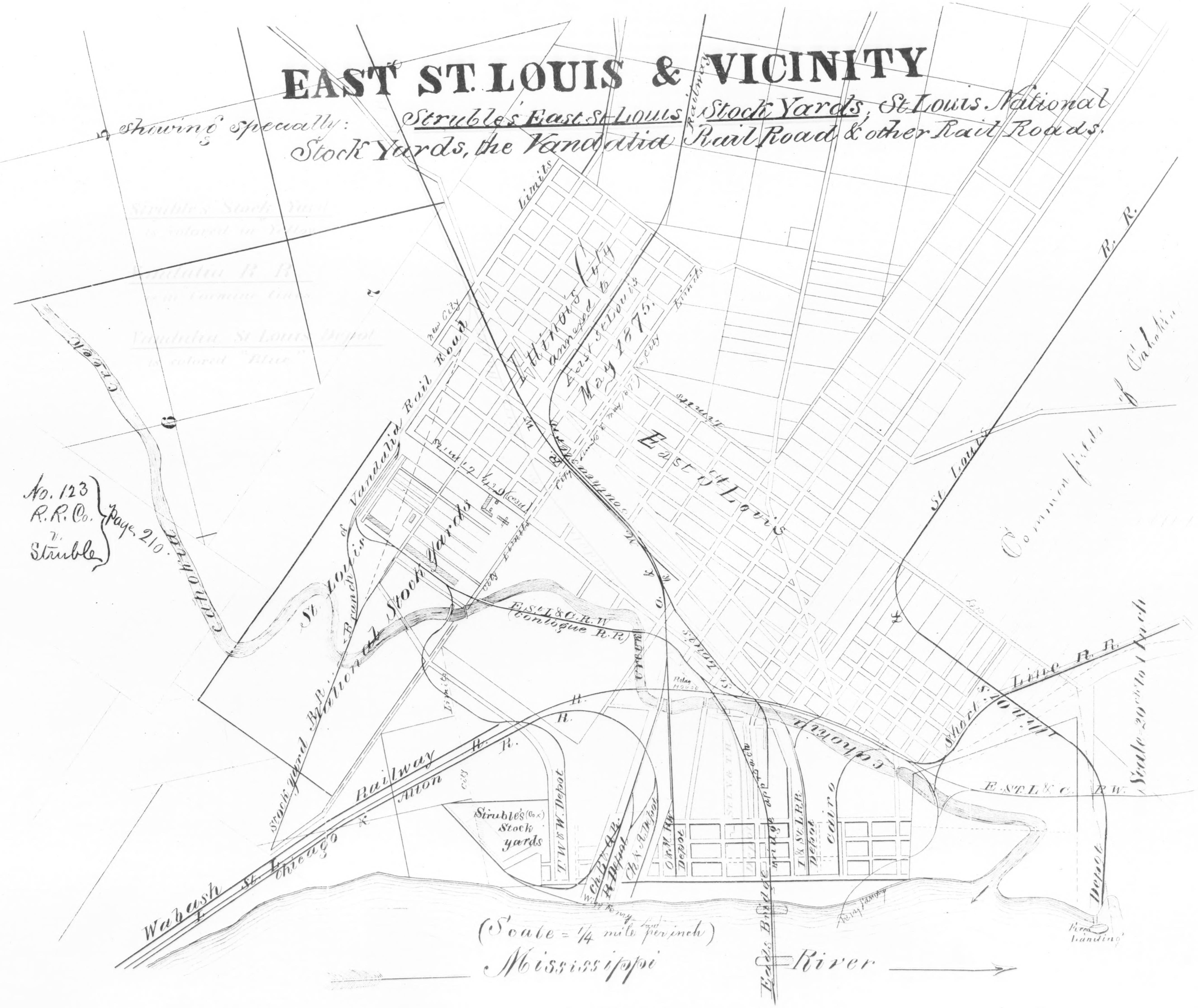
No. 123
Terre Haute & Indianapolis R.R. Co.
vs
Struble

page 144.



EAST ST. LOUIS & VICINITY

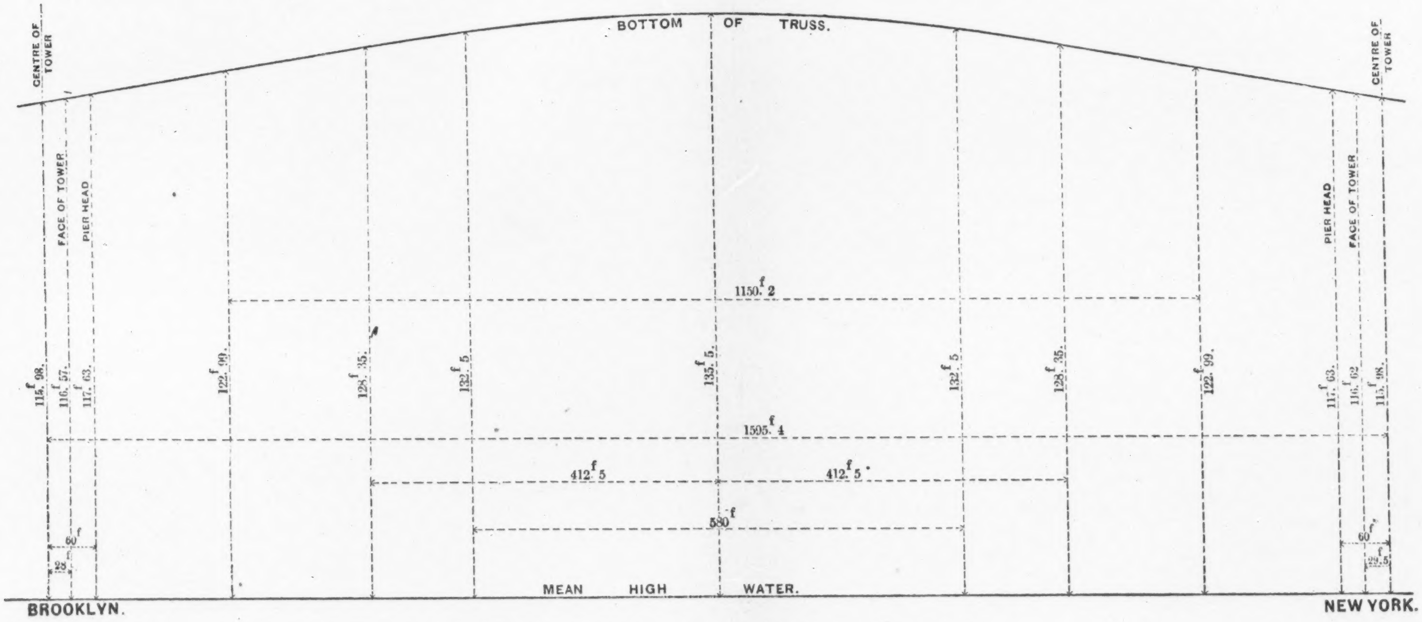
showing specially: Struble's East St. Louis Stock Yards, St. Louis National Stock Yards, the Vandalia Rail Road & other Rail Roads.


Struble's Stock Yard is colored in Yellow
Vandalia R. R. in Carmine Color
Vandalia St. Louis Depot is colored "Blue"
Illinois City annexed to East St. Louis May 1875.
East St. Louis
St. Louis National Stock Yards
Vandalia Rail Road
St. Louis Branch of Vandalia
Stock Yard R.R.
Cahokia Creek
Ohio & Mississippi R. R.
St. Louis & Vandalia
E. St. L. & C. R. W. (contigue R.R.)
Relay House
Wabash St. L. Chicago & Alton Railway R. R.
Struble's (Cox) Stock yards
T. W. & W. Depot
W. Ch. B. & Q. R. R. Depot
Ch. & A. Depot
O. & M. Ry. Depot
St. L. V. & T. H.
Bridge approach
I. & St. L. R.R. Depot
Cairo
Short Line R. R.
St. Louis R. R.
Commons field of Cahokia
E. St. L. & C. R. W.
Depot
Ferry landing
Eads Bridge
City limits
(Scale = 1/4 mile per inch)
Mississippi River

No. 123
R.R. Co.
v.
Struble } Page 210.

Defendant's Exhibit A of March 1[illegible] 25, 18~~6~~78.—J. A. S. Ex'r.

EAST RIVER BRIDGE—Elevation of the Truss above Mean High Water.



Horizontal Scale, 200 feet 1 inch. Vertical Scale, 40 feet 1 inch.

J. Richards.

No. 126 -
Fay & Co.
v.
Cordesman
Brothers
page 531.

Guide and Support for Scroll Saws.

Patented May 27. 1862.

Fig: 2.

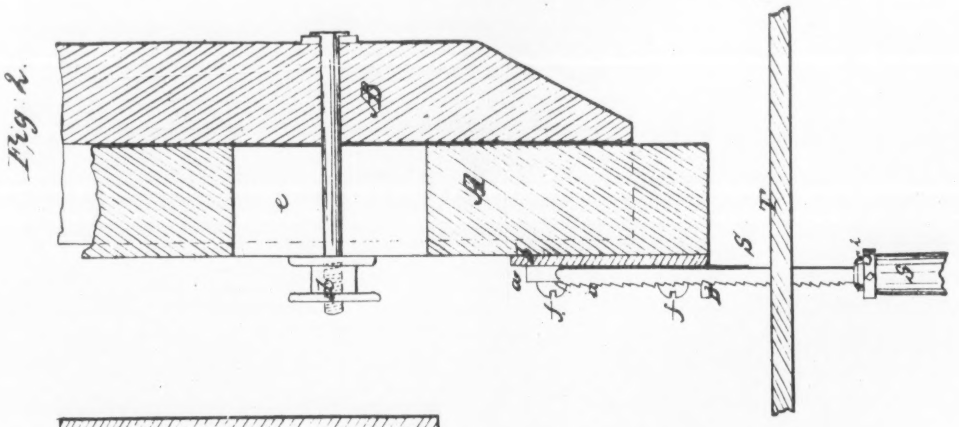


Fig: 3.

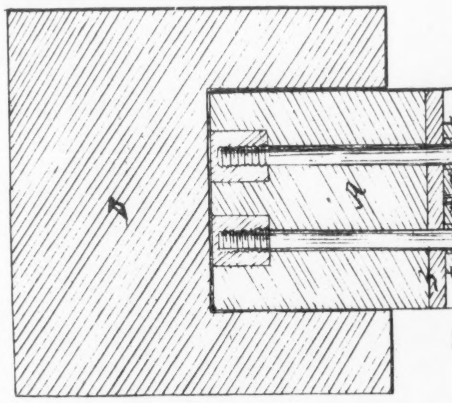
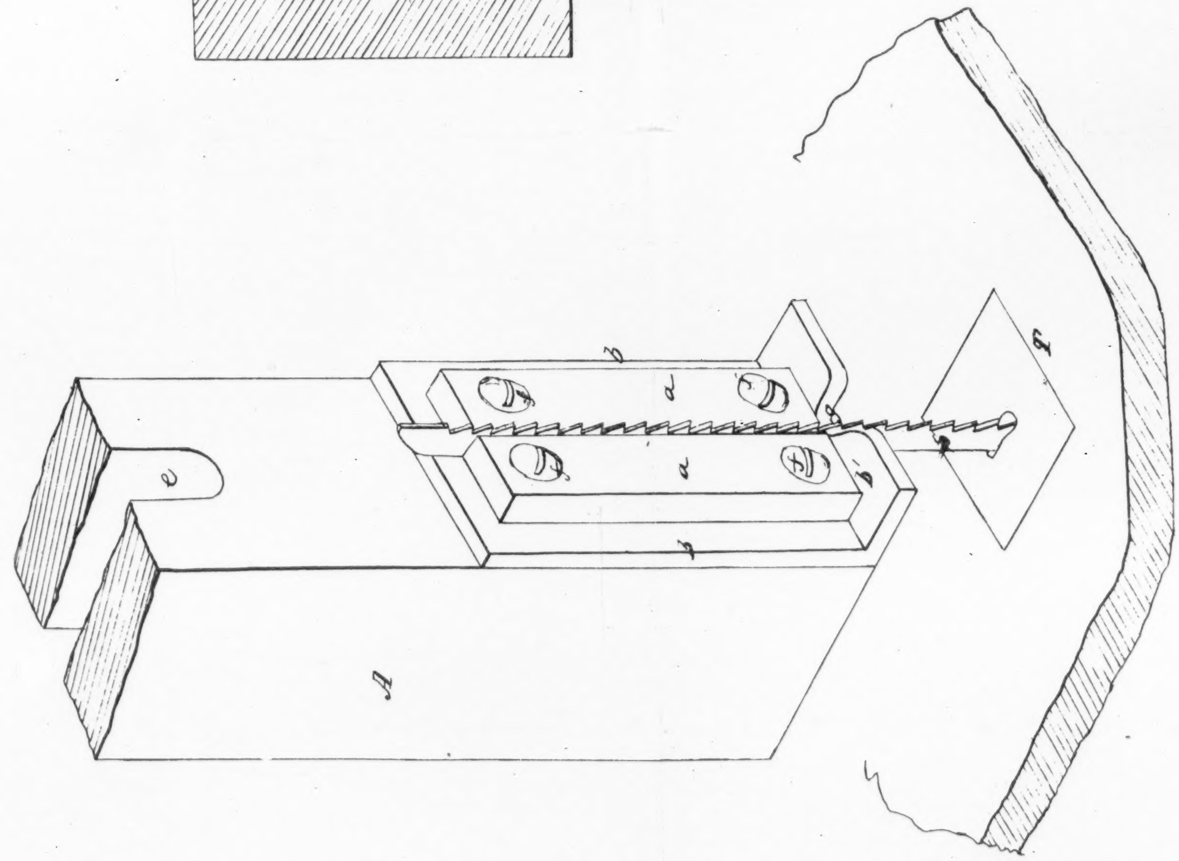


Fig: 1.



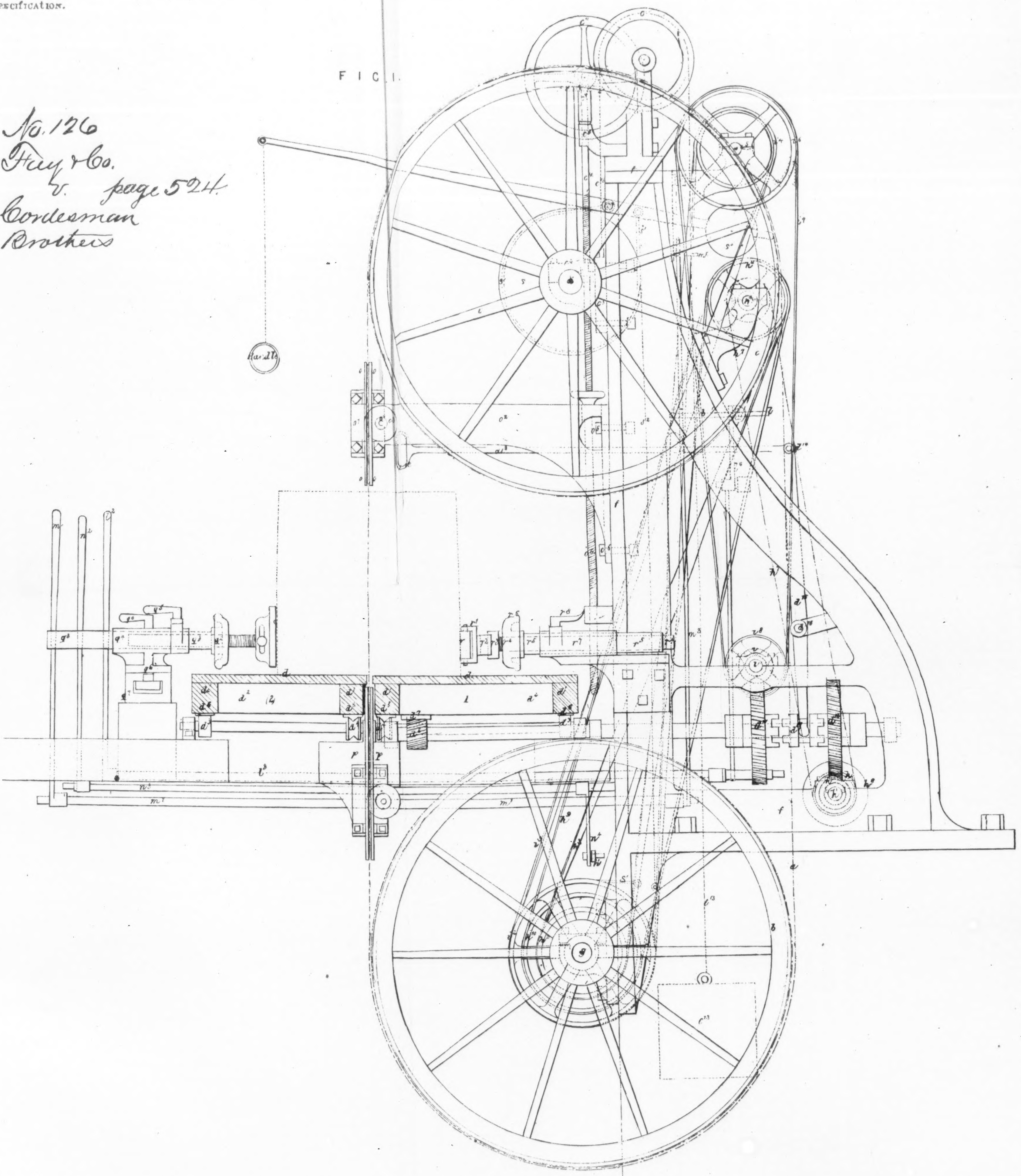
Witnesses:
Gustavus Dieterich
Edwin F. Jacob

Inventor:
John Richards
by
Mason, Fenwick & Lawrence
attys

A.D 1861. Feb. 28. Nº 516.
WILSON'S Specification.

No. 126
Frey & Co.
v. page 524.
Cordesman
Brothers

FIG. 1.



A.D. 1861. FEB. 28. Nº 516.
WILSON'S SPECIFICATION.

(3 SHEETS)

No. 126
Fay & Co.
v.
Cordesman
Brothers
page 523.

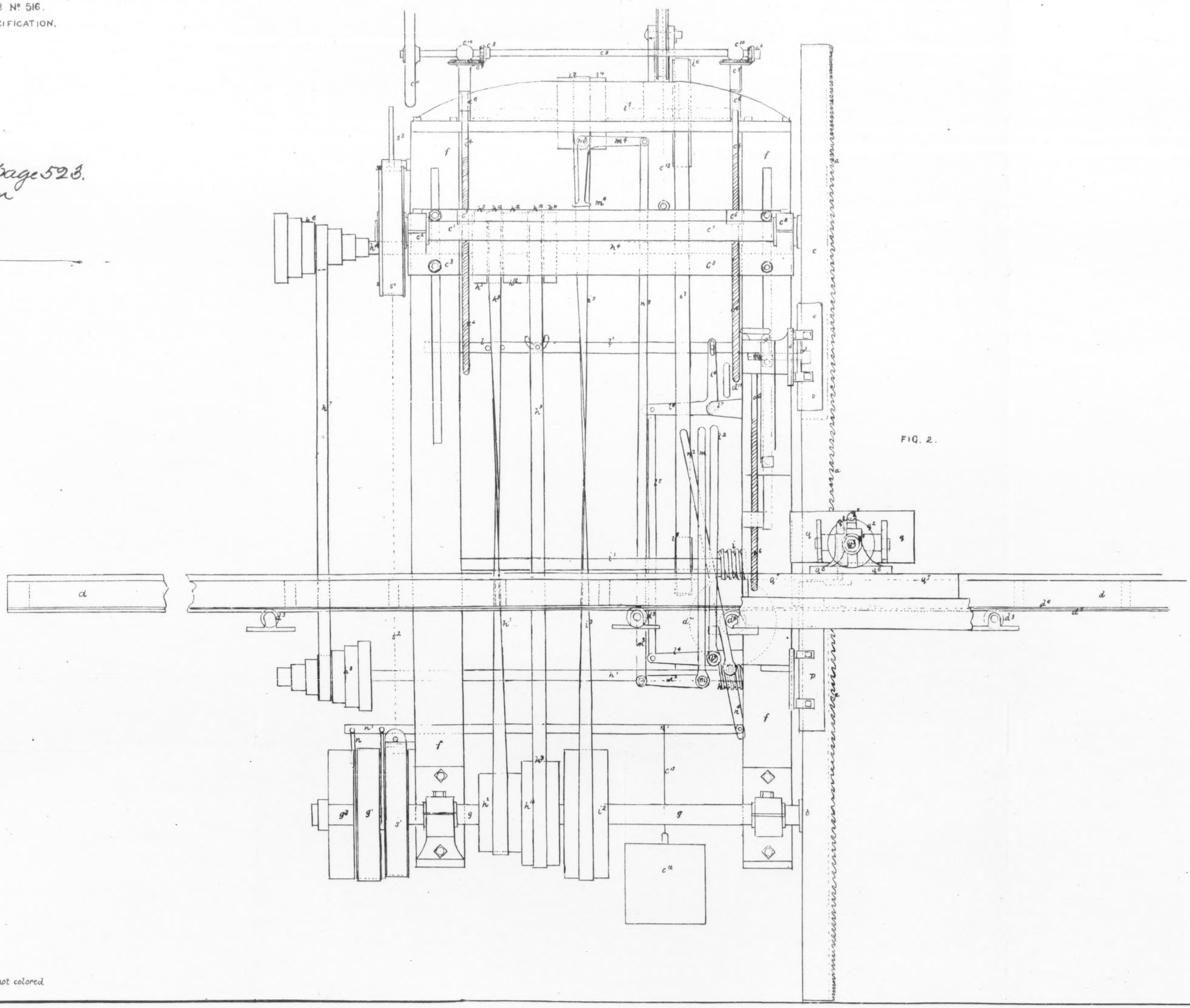


FIG. 2.

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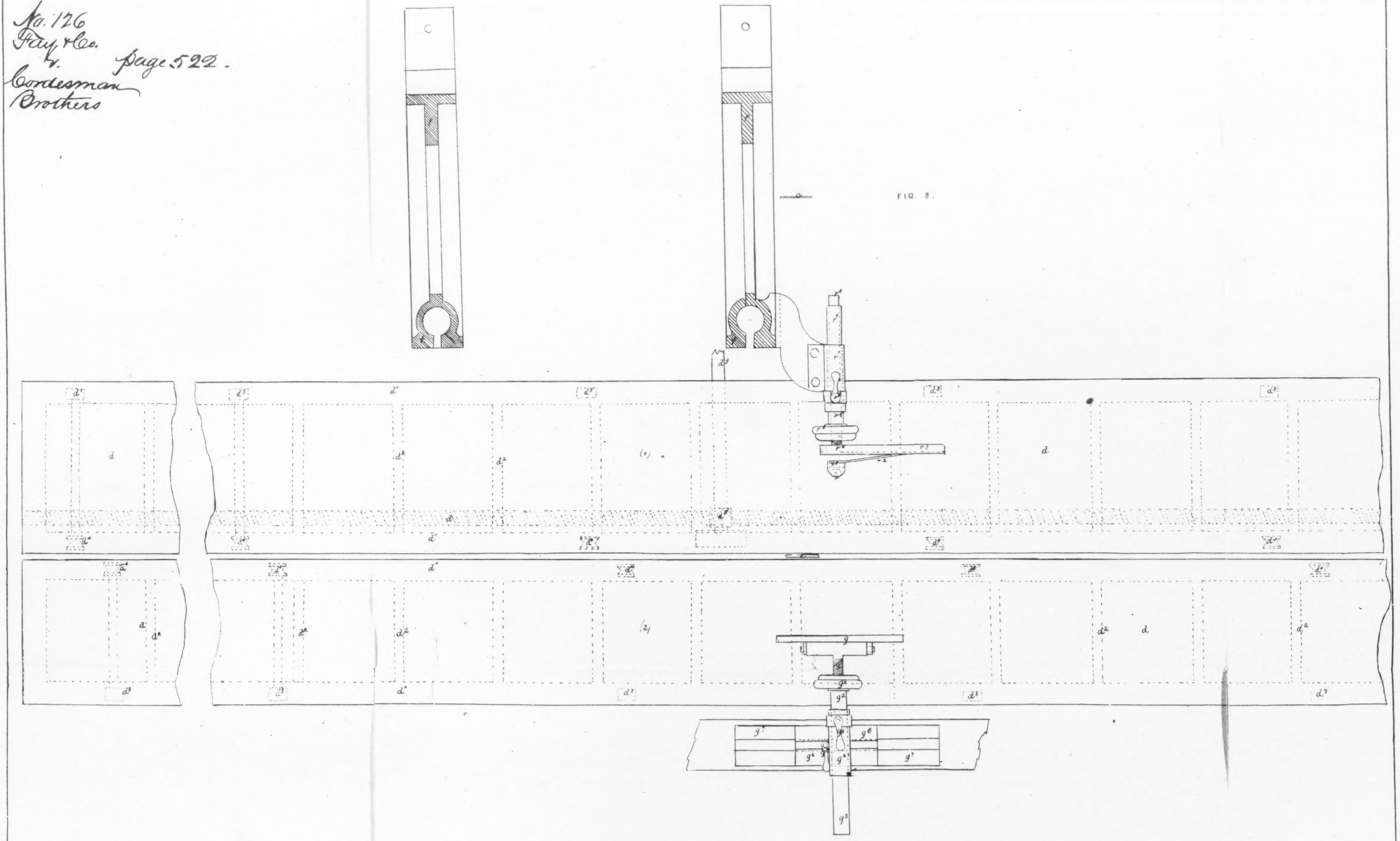
SHEET 3
(3 SHEETS.)

A. D 1861 FEB. 20. No 516.
WILSON'S SPECIFICATION.

No. 126
Fay & Co.
v.
Cordesman
Brothers
page 522.

FIG. 3.



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A D 1856 Feb 27 No 502
EXALL'S SPECIFICATION

(1 SHEET)

No. 126
Fay & Co.
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Brothers
page 507

507

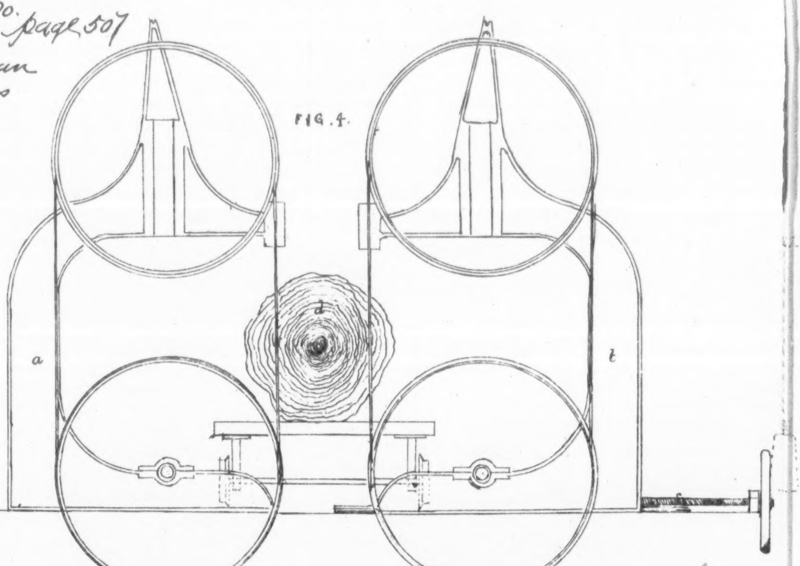
FIG. 4.

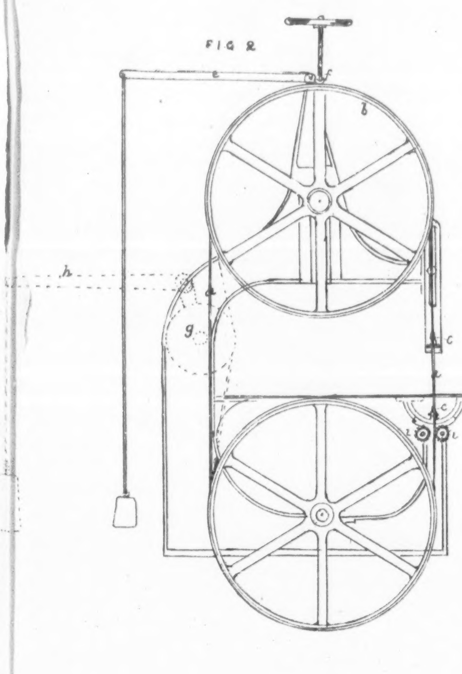
FIG 2

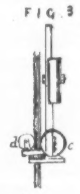
FIG 3

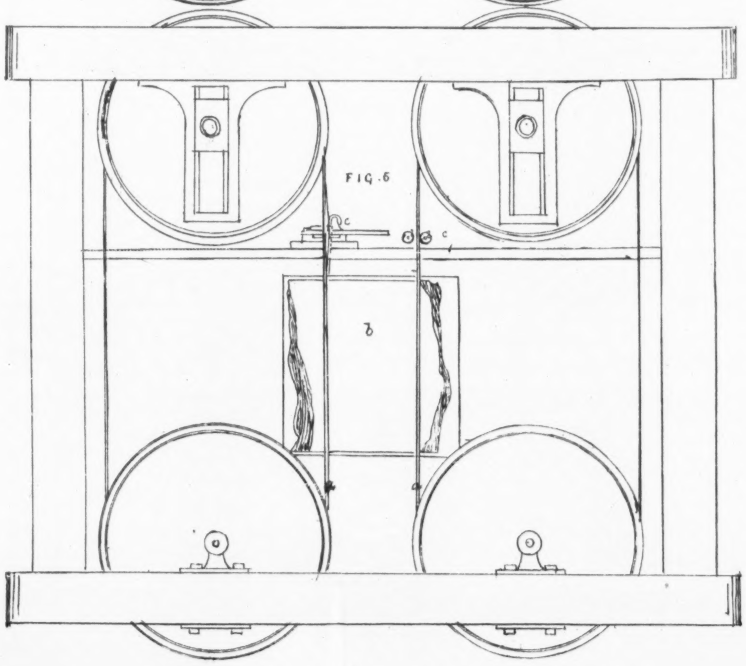
FIG 5

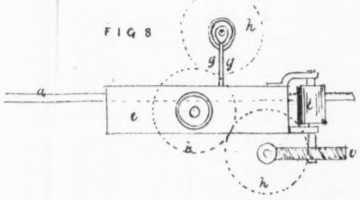
FIG 8

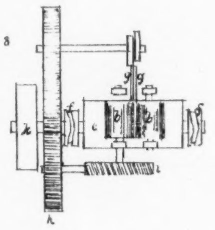
FIG 8

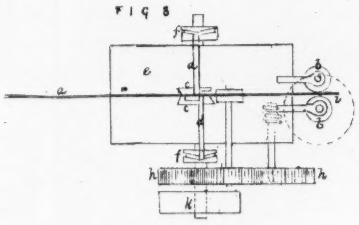
FIG 8

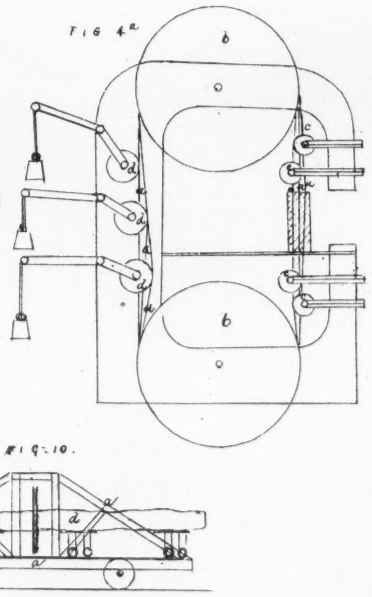
FIG 4a

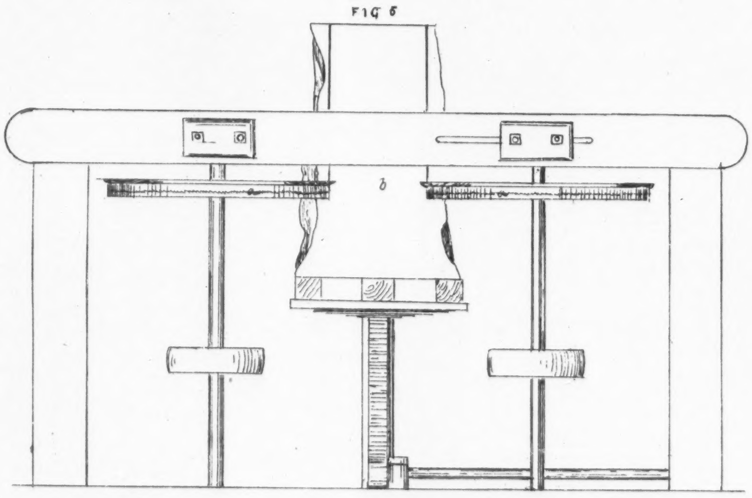
FIG 5

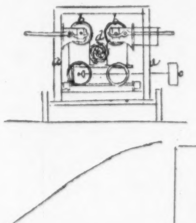
FIG. 11.

FIG. 10.

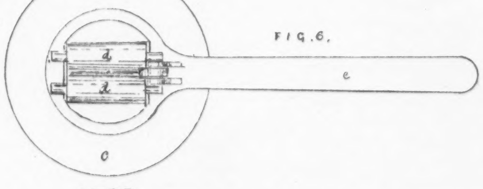
FIG. 6.

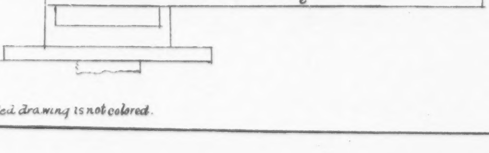
FIG 7

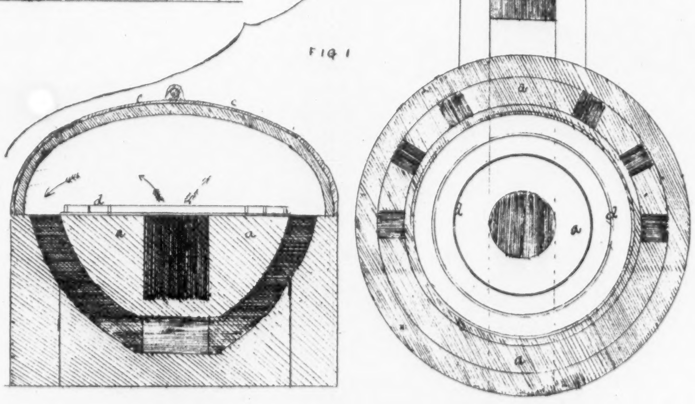
FIG 1

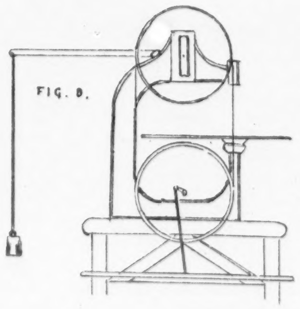
FIG. 8.

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No. 126.
Fay & Co.
v. page 601.
Cordesman
Brothers

A. Giraudat.

Scroll Saw.

No. 35.817.

Patented July 8. 1862.

Fig. 1.

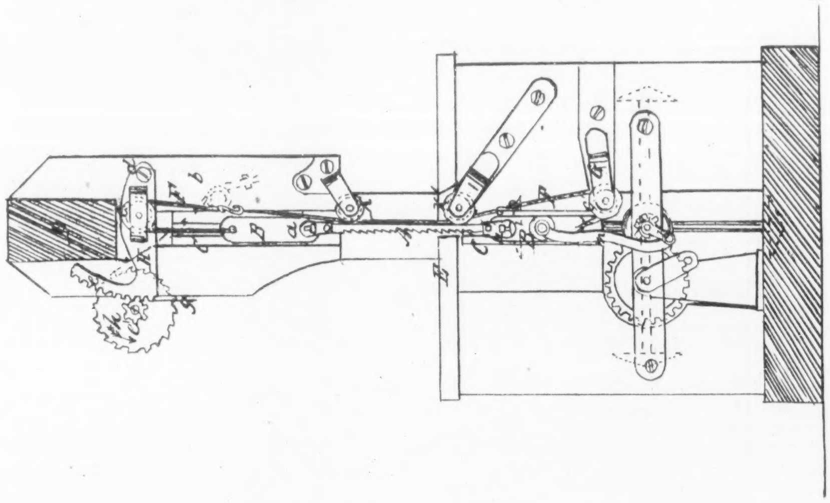
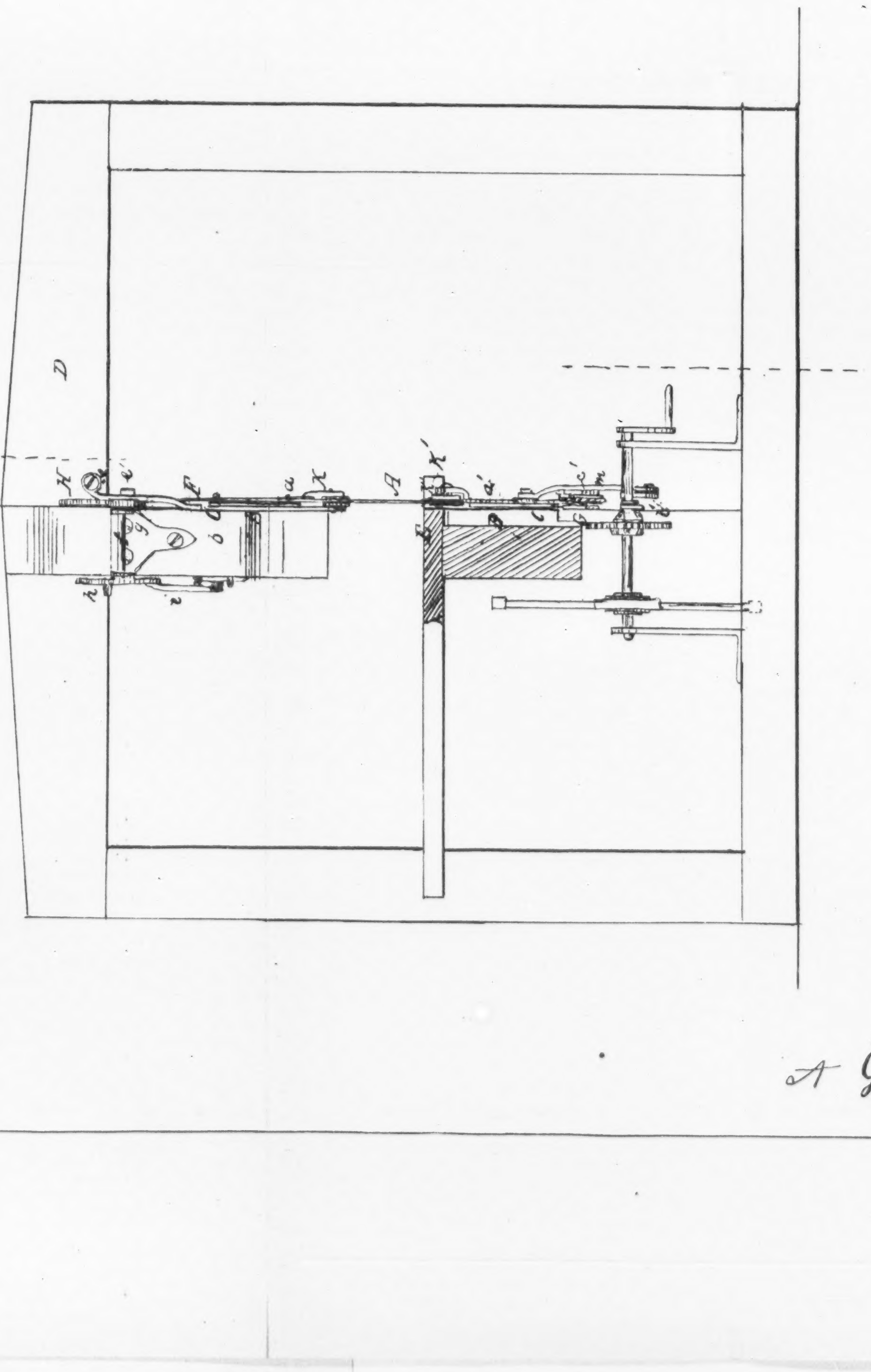


Fig. 2.



Witnesses:

Johannes Lund
R. Gawley

Inventor

A Giraudat

No. 126.
Fay + Co.
v.
Cordesman
Brothers

page 542.

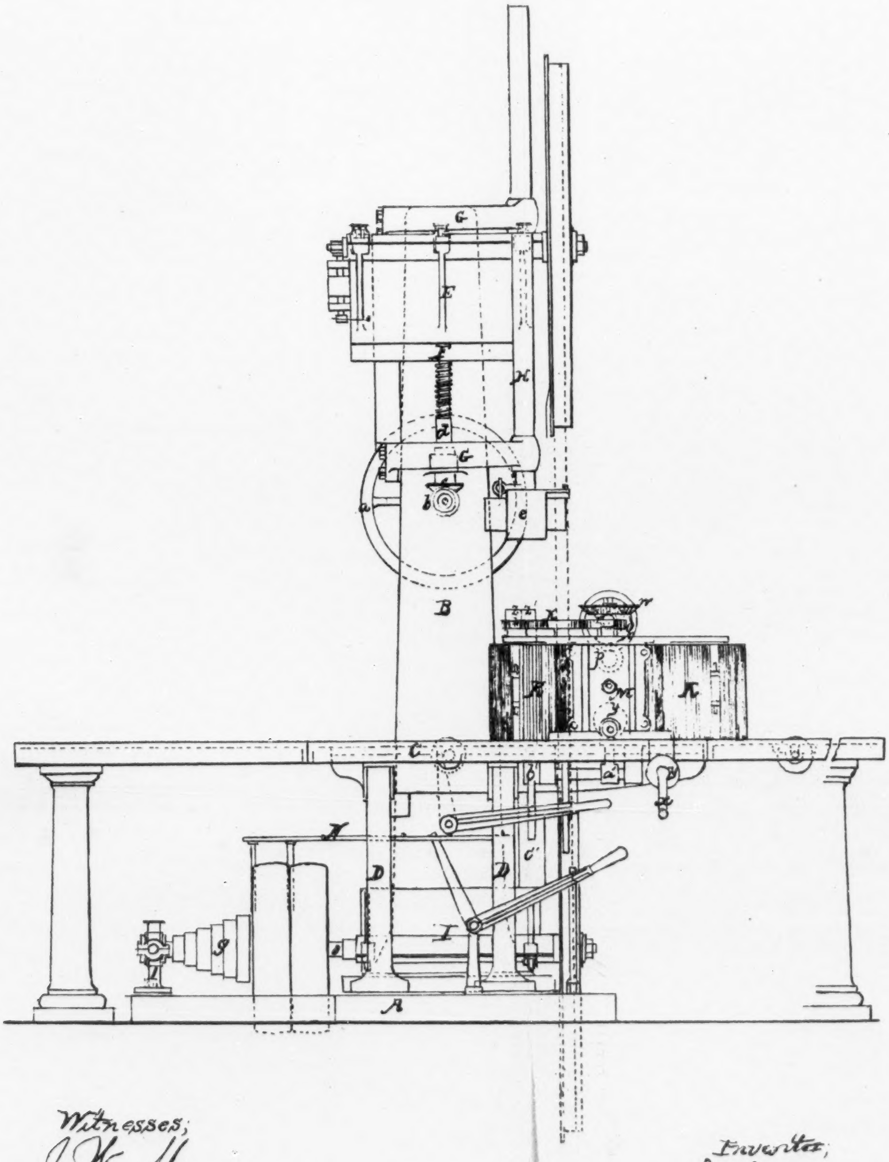
Sheets-3 Sheets.

A. Perin.

Saw Mill.

No. 97,801.

Patented Dec. 14, 1869



Witnesses;
J. W. Mister
C. F. Brown

Inventor;
Perin
by T. S. Whitman atty

No. 126
Fay & Co.
v.
Cordesman
Brothers

page 541.

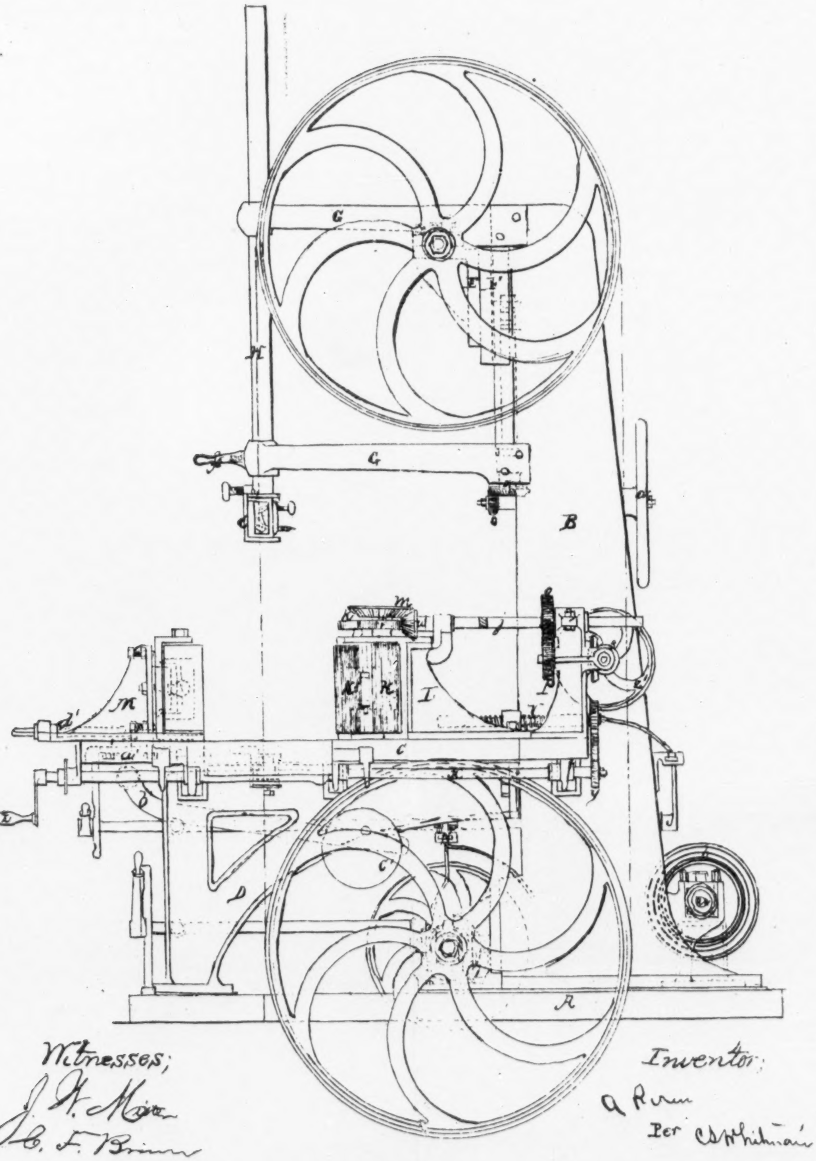
Sheet 2-3 Sheets.

A. Perin.

Saw Mill.

No. 97,801

Patented Dec. 14, 1869.



Witnesses;

J. W. M
C. F. Brown

Inventor:

A Perin
Per C.H. Whitman atty

No. 126-
Fay & Co.
v.
Cordesman
Brothers

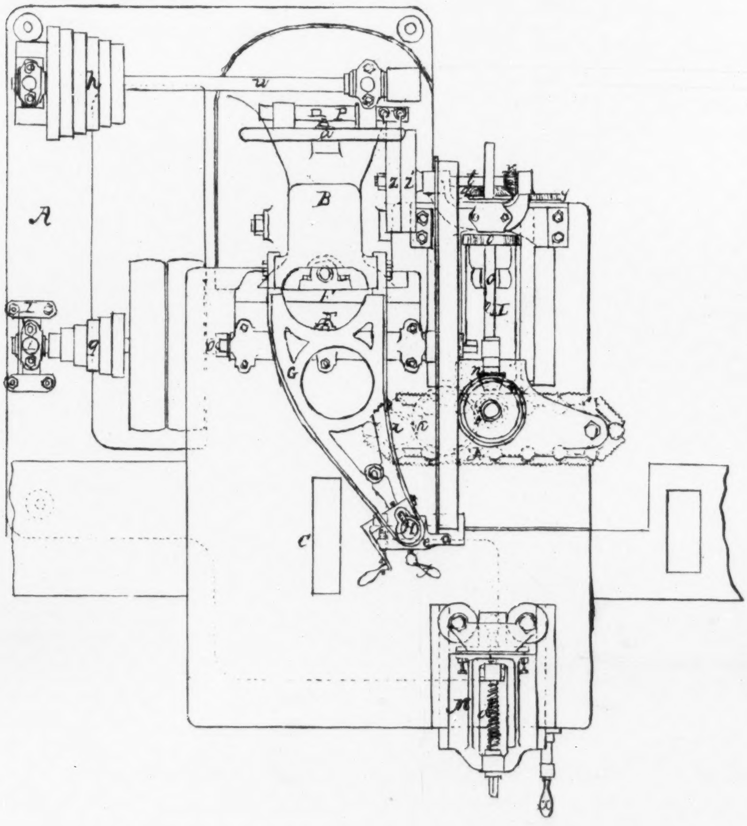
page 540

Sheet 1-3 Sheets.

A. Perin.

Saw Mill.

No. 97,801. Patented Dec. 14, 1869.



Witnesses
J. W. Master.
C. F. Brown

Inventor;
A Perin
Per C S Whitman atty

Niderkorn & Dubernet,

Guide for Scroll Saws.

No. 39,164. Patented July 7, 1863

No. 126
Fay & Co
v.
Cordesman
Brothers
} page 593

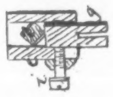


Fig. 3

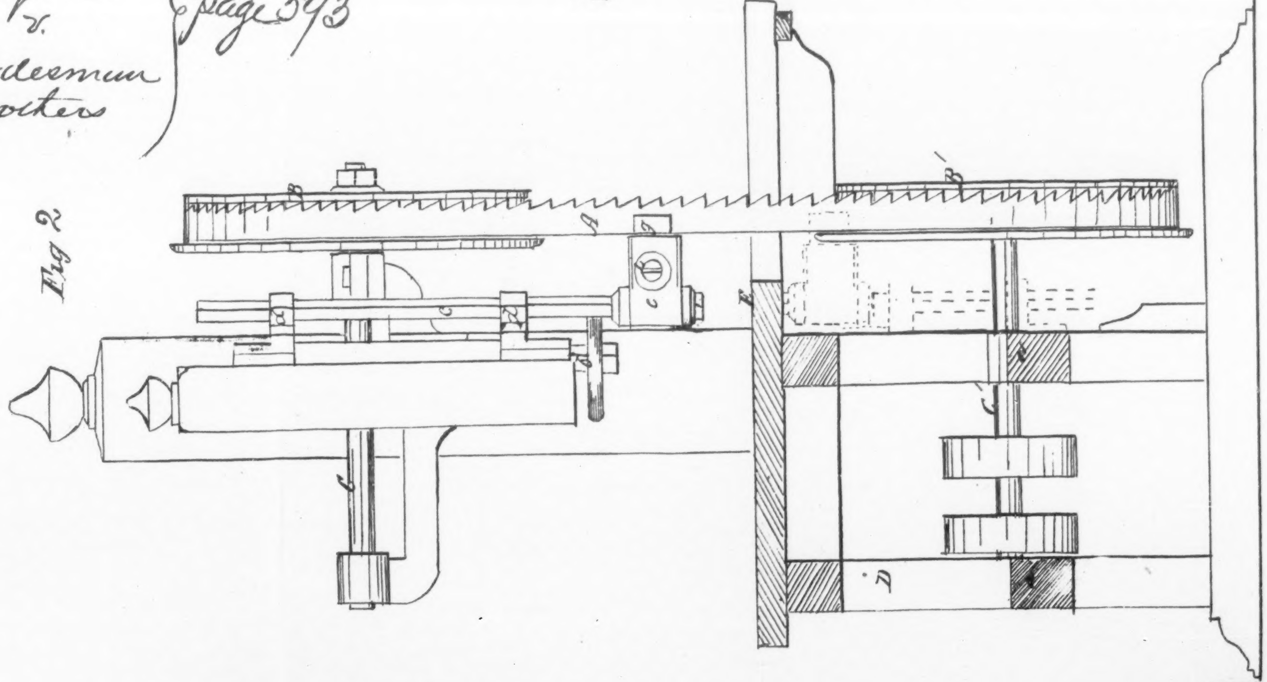


Fig. 2

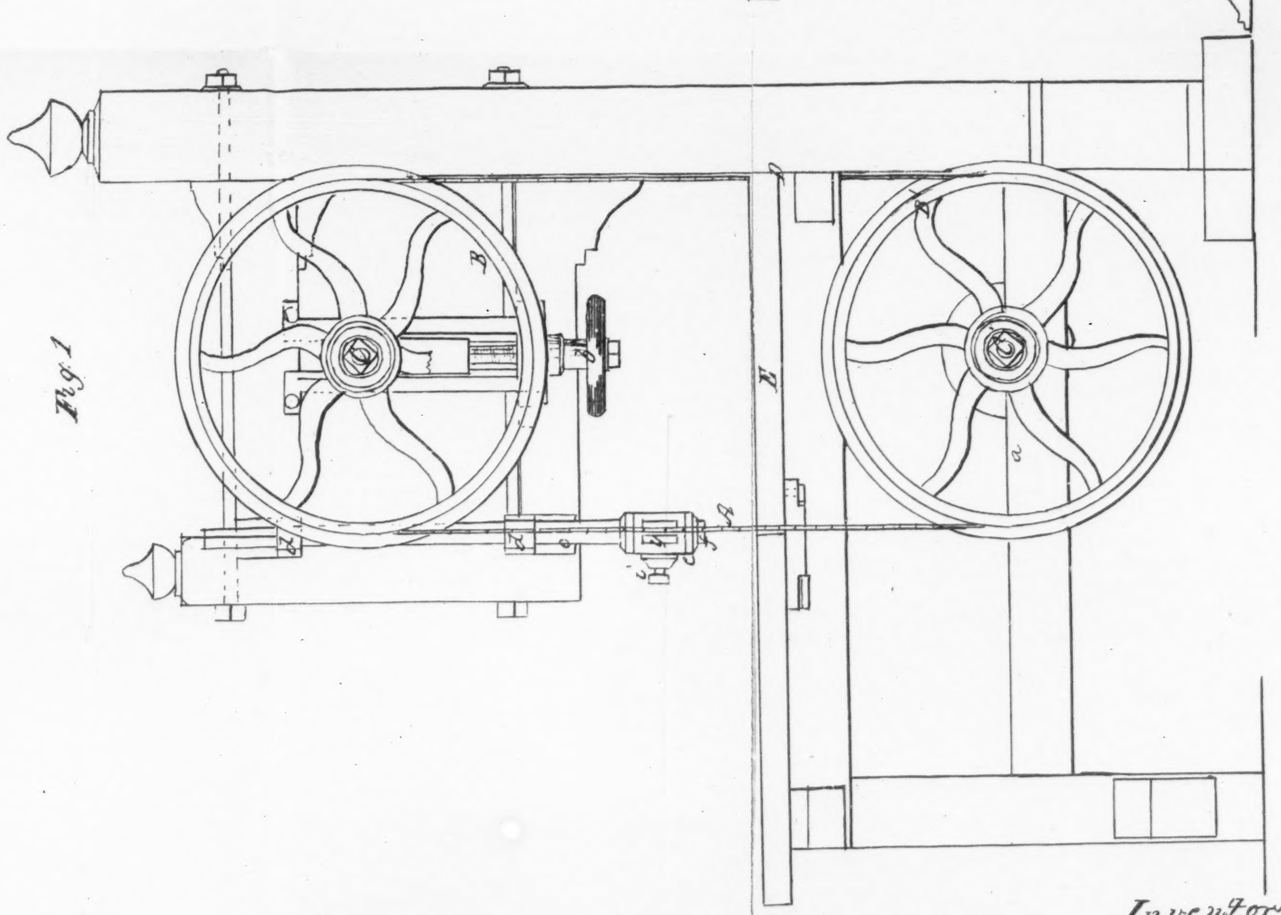


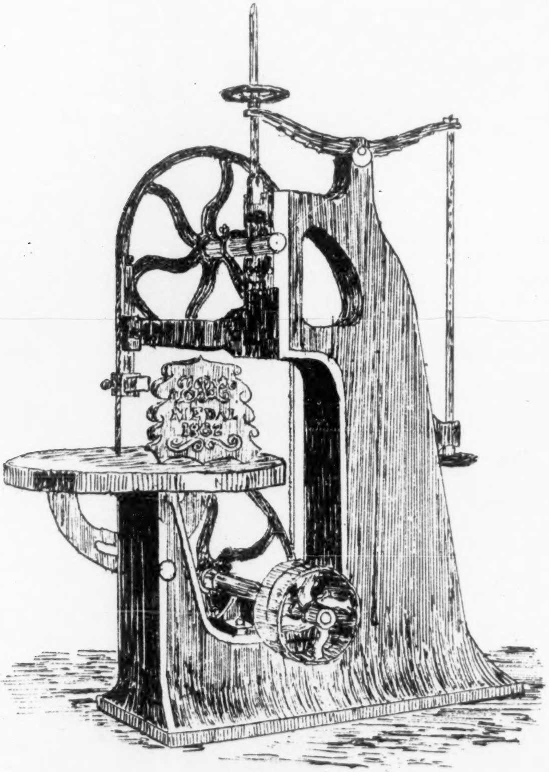
Fig. 1

Witnesses.
J W Coombs
M M Livingston

Inventor:
G. Niderkorn
J. Dubernet

NEW PATENT ENDLESS BAND-SAWING MACHINE

Exhibit Powers James & Co
J. Herman Herrell
acting Spl Ex.
& O



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Fay & Co.
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Brothers
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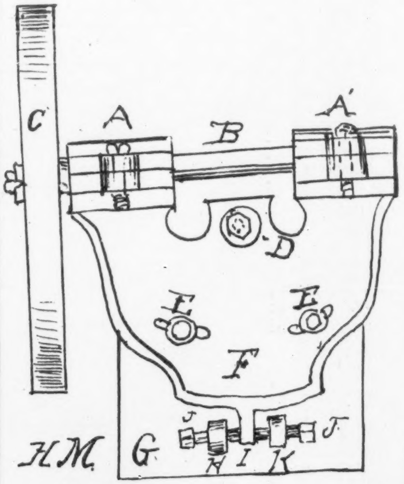
No. 126-
Fay & Co.
v. page 583.
Cordesman
Brothers

Richards & Thorne,

Band Saw Mill.

No. 104.770. Patented Jun. 28. 1870.



H.M.

FIG. 3

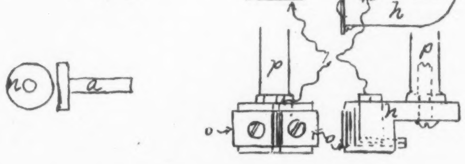


FIG. 1

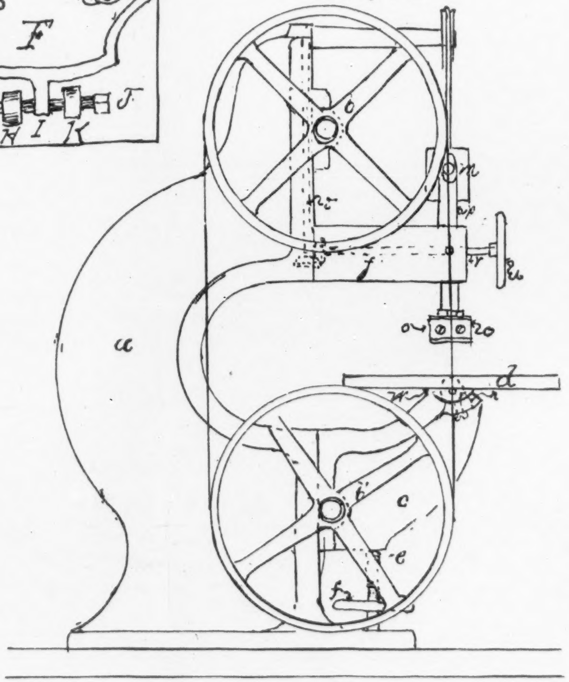
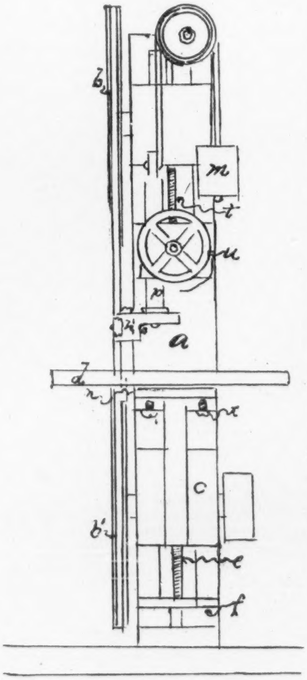


FIG. 2



Fays old machine at
Mitchell & Rammelsberg
Manufactured in 1868

WITNESSES
Wm S Kelley
David L. Collier

INVENTORS
John Richards
Wm H Thorne

A D 1863, FEB 26 N° 531
THOMPSON'S SPECIFICATION

SHEET I.

No. 126 -
Fay & Co.
v.
Cordesman
Brothers

page 610.

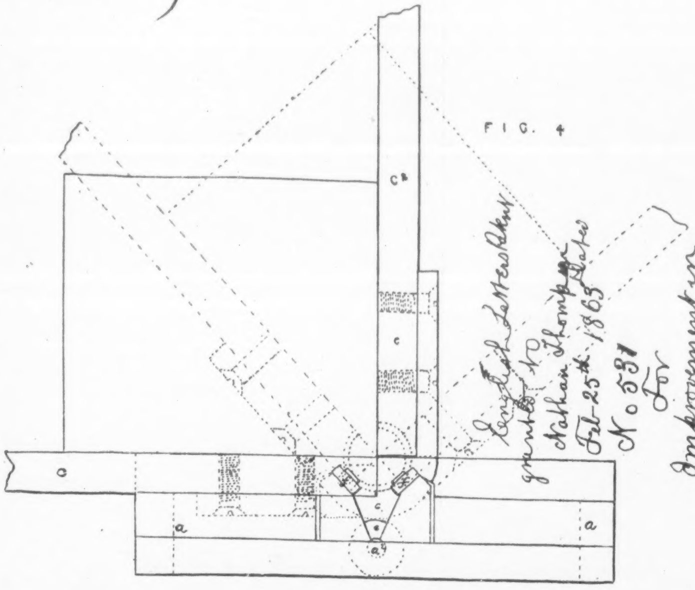


FIG. 4

English Letters Patent
granted to
Nathan Thompson dated
Feb 25th 1863
No 531
For
Improvement in
Machinery for
Sawing Wood

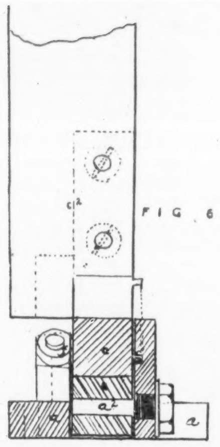


FIG. 6

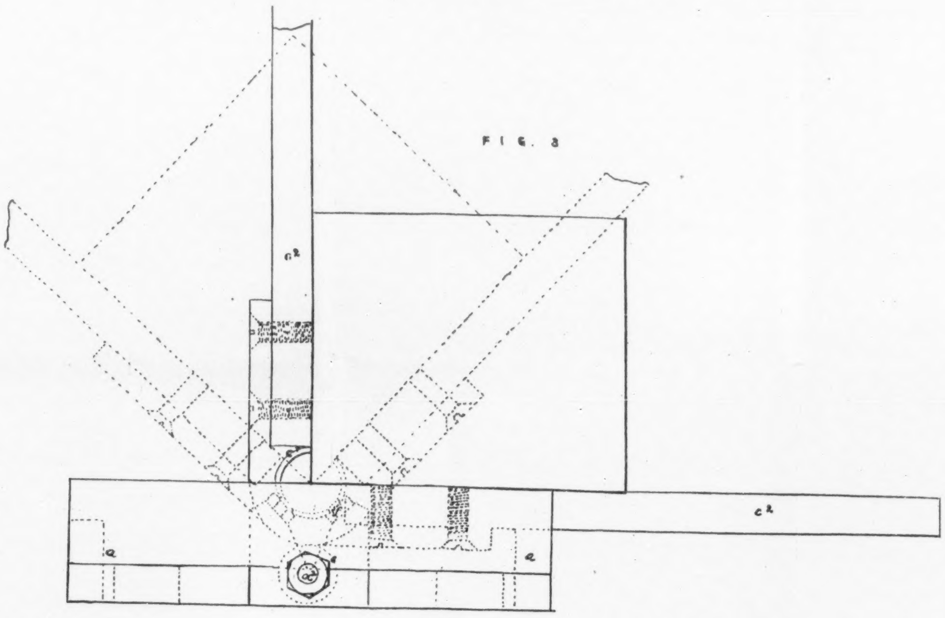


FIG. 3

p11
p10

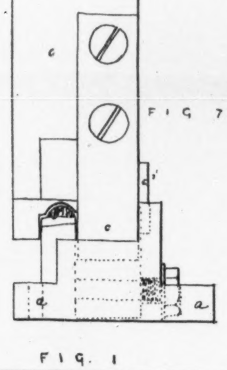
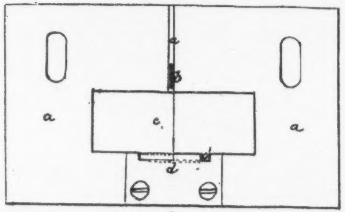


FIG 7.

FIG. 1


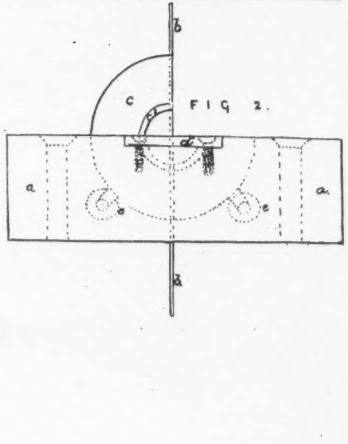
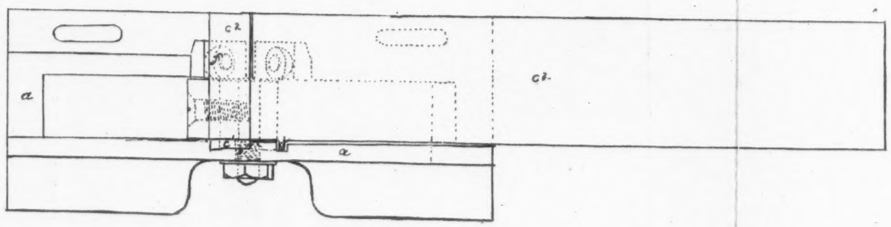


FIG 2.



A.D. 1863 Feb 25 No. 531
THOMPSON'S SPECIFICATION.

(2 SHEETS)
SHEET 2.

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Fay & Co.
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Cordesman
Brothers
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FIG. 8

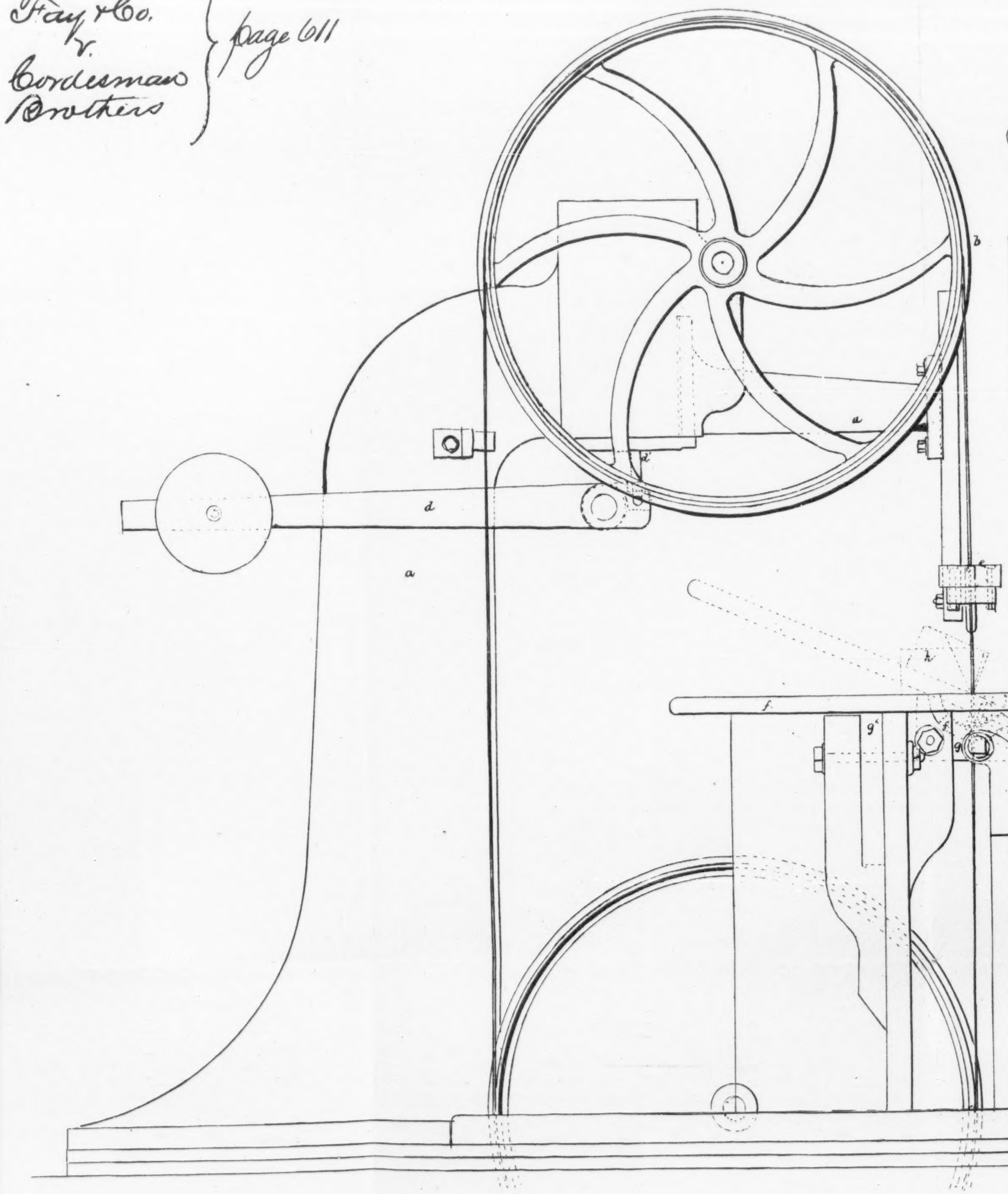


FIG. 11

Vertical Section

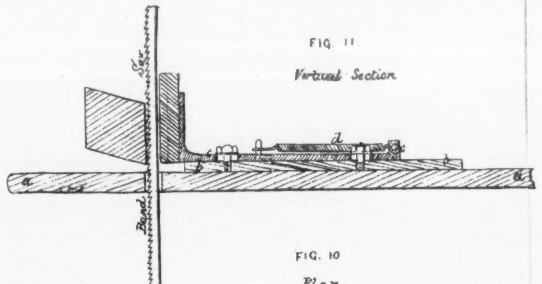


FIG. 10

Plan.

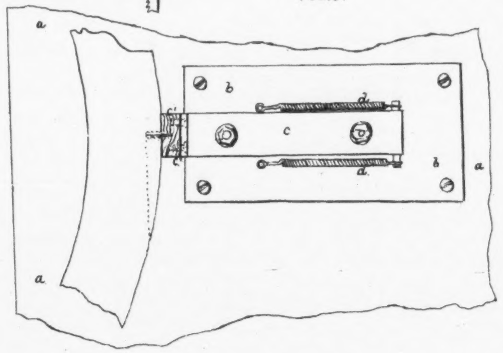
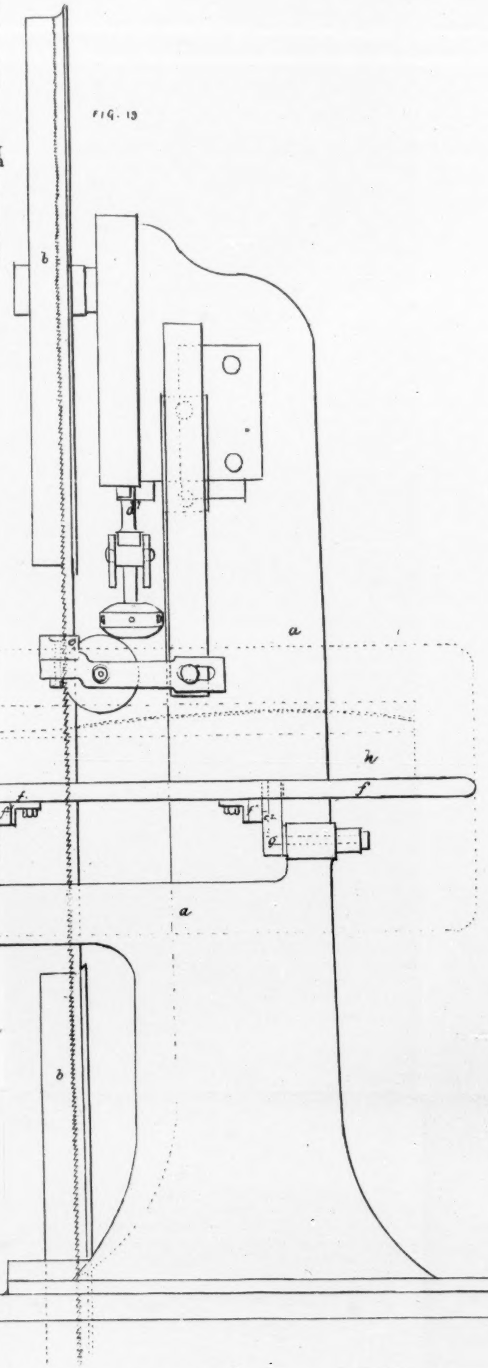


FIG. 13



No. 126.
Fay & Co.
v. page 574.
Cordesman
Brothers

L Hedge

Endless Saw.

No. 435. Reissued Mar. 10. 1857.

Fig: 4.

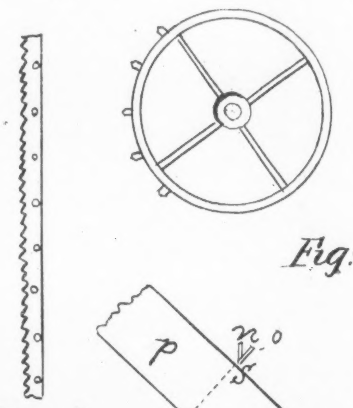


Fig 2

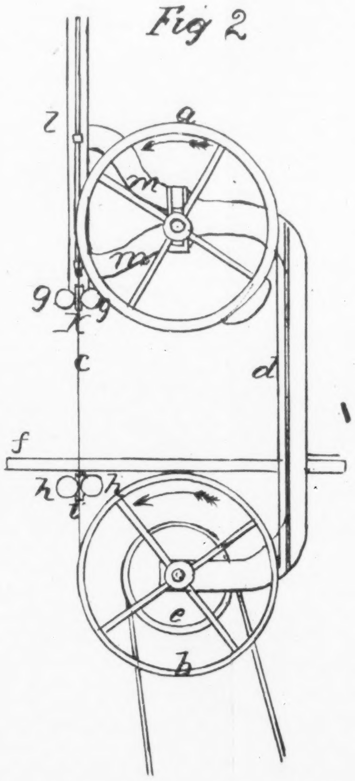


Fig: 5. Fig: 7 Fig: 8.

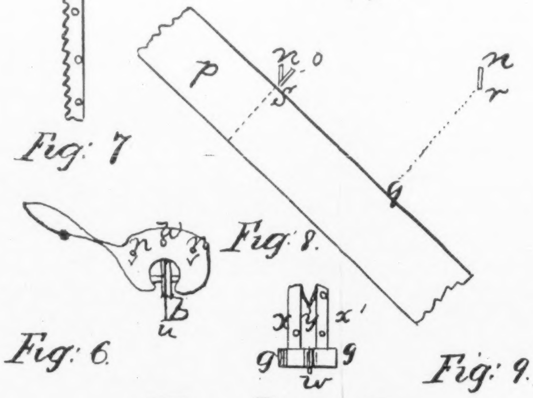


Fig: 6.

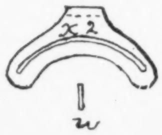


Fig: 9.

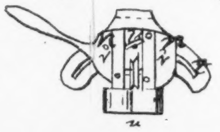
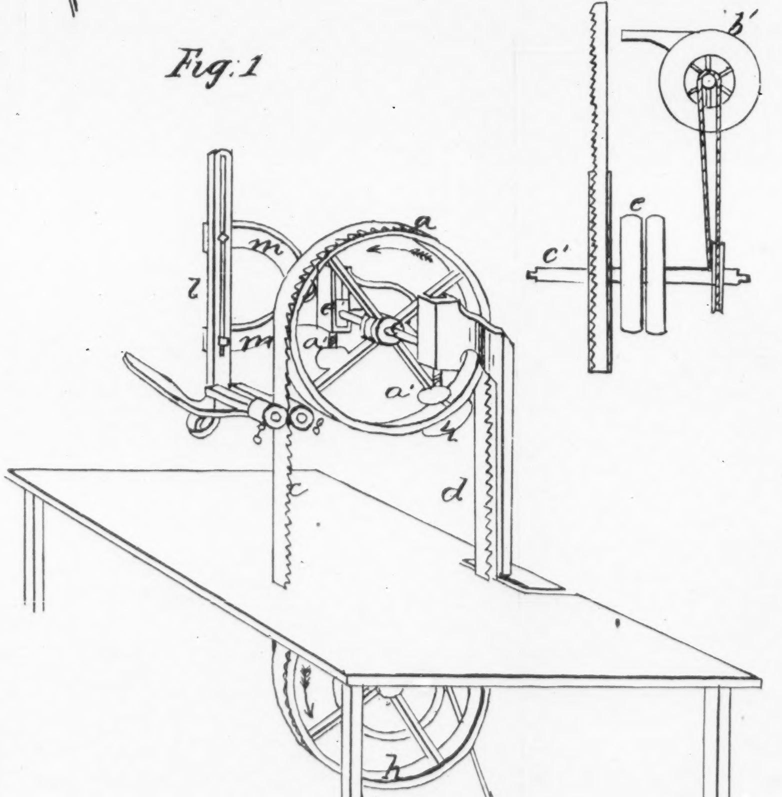


Fig: 1 Fig: 3.



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Fay & Co.
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Cordesman
Brothers
} page 625.

P. Pryibil

Saw Mill.

No. 57,565 Patented Aug. 28 1866.

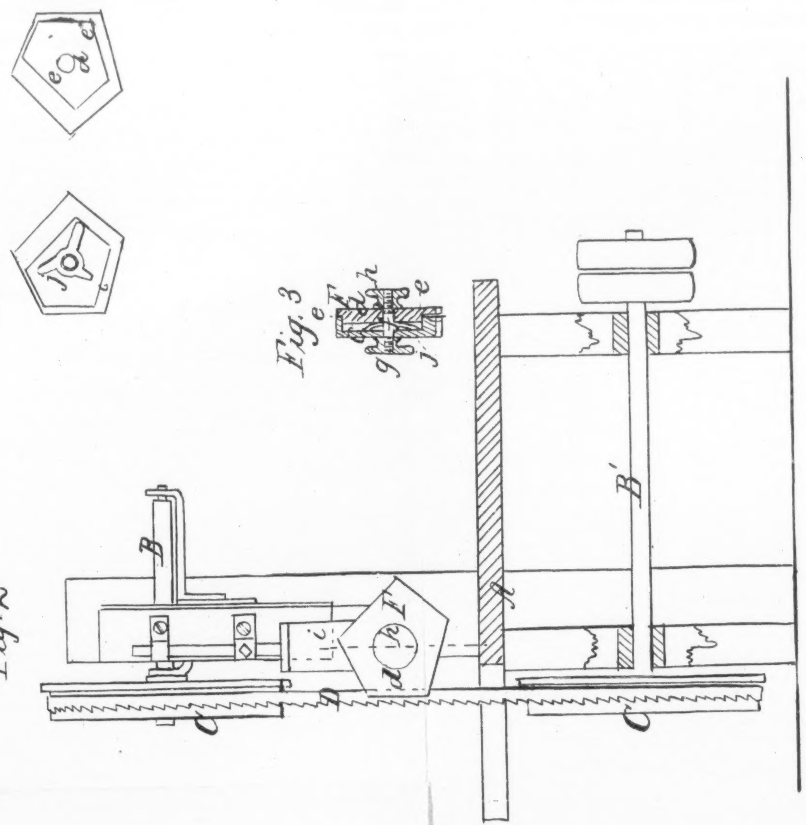


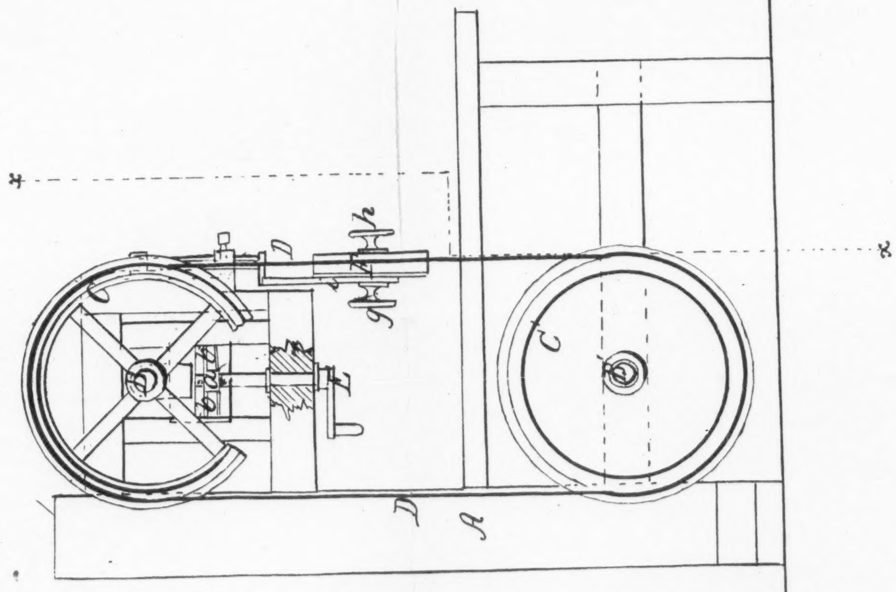
Fig. 5

Fig. 4

Fig. 3

Fig. 2

Fig. 1



Witnesses
J. H. Blomington
Jas A. Lewis

Inventor
Paul Pryibil
Per Munn & Co
Attorneys

PATENTED SEP 6 1870

J T Plass' Impt in Band Saw Machines

107195

Fig 2

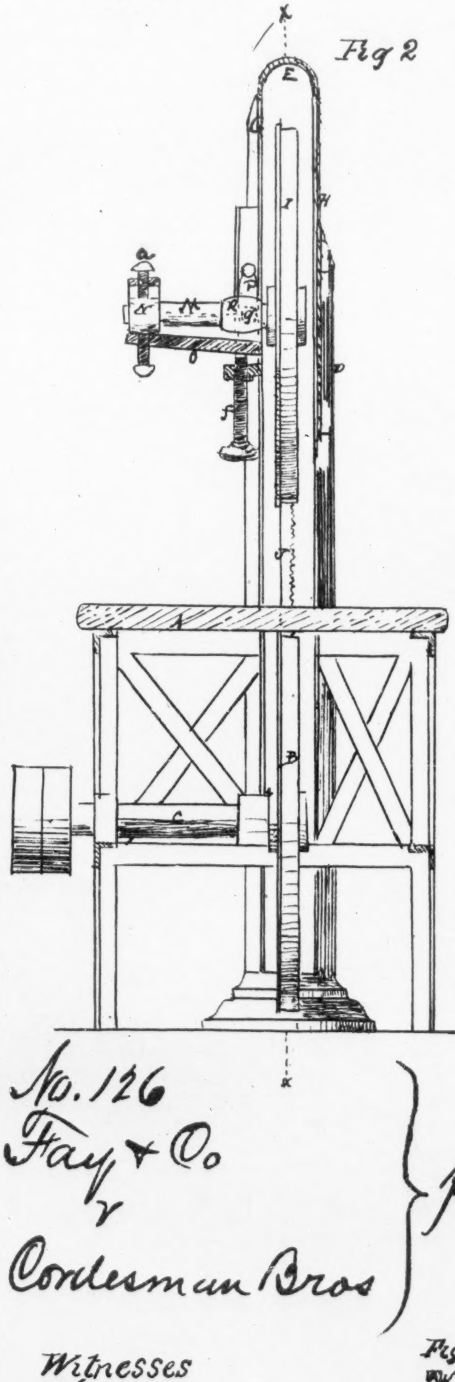
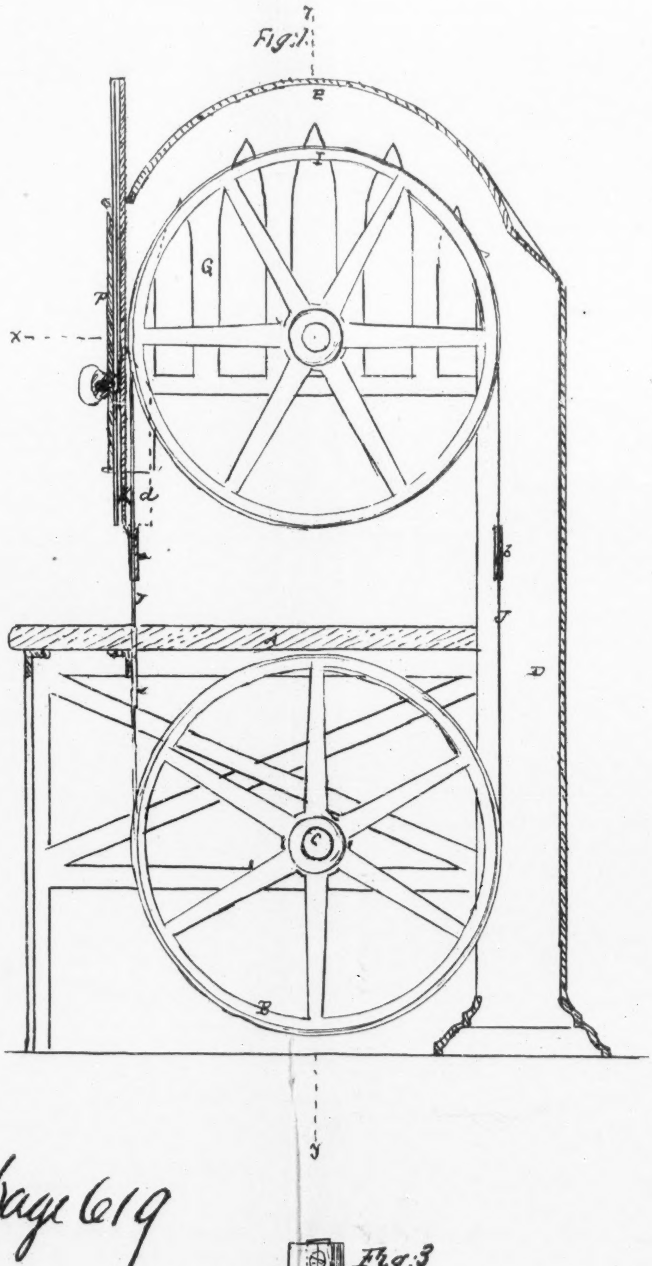


Fig:1



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Fay & Co
v
Cordesman Bros

page 619

Fig:3

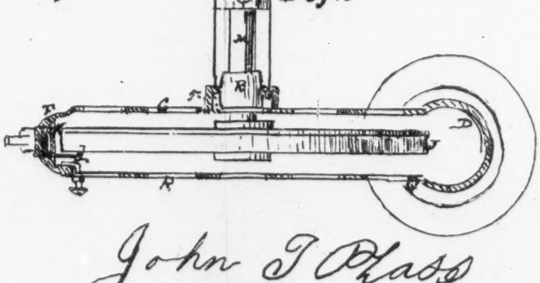
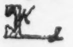


Fig:4



Witnesses
Fred Haynes
M J Shantey

John T Plass

R. ATKINSON

SAWING MACHINE

No. 85894

Patented January 19 1869

No. 126
Fay & Co.
v.
Cordesman
Brothers
} page 633.

Fig. 1.

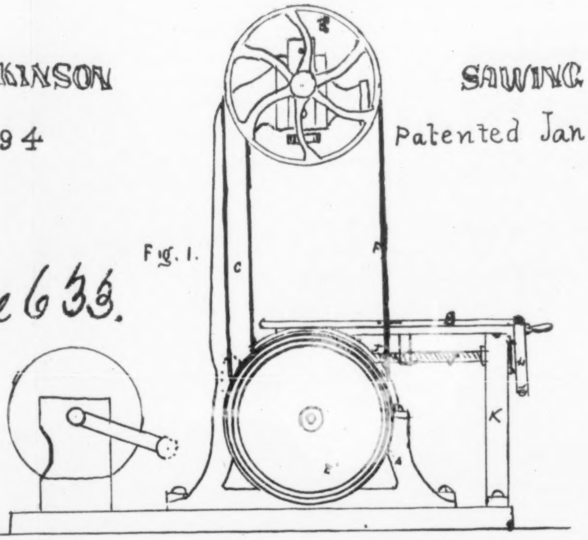


Fig 2

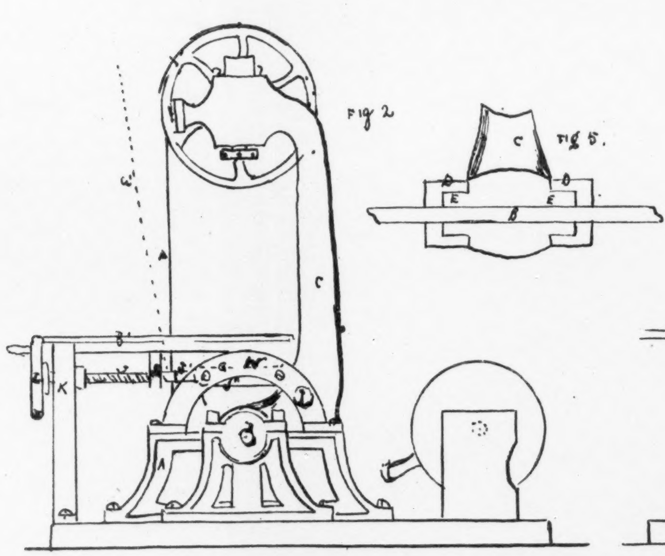


Fig 5.

Fig. 3.

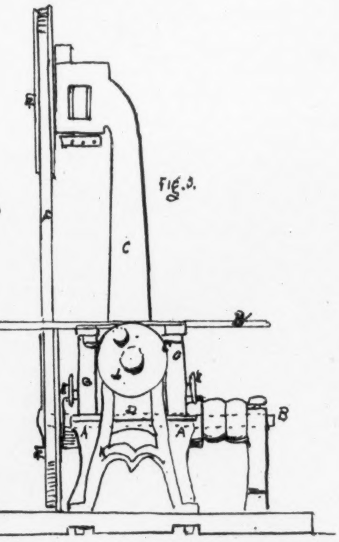
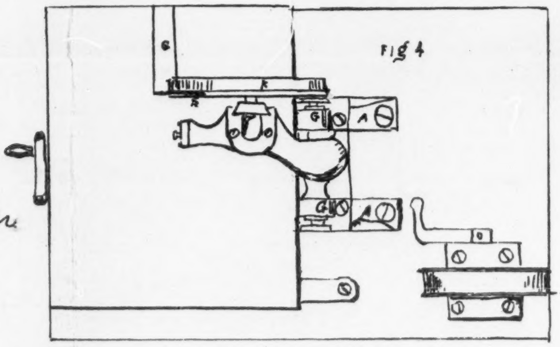


Fig 4



Inventor
Richard Atkinson

Witnesses
K Coon
E E White

No. 126
Fay & Co.
v. page 643.
Cordesman
Brothers

W. C. Huntington.

Sawing Machine.

No. 21,200.

Patented Aug. 17. 1858.

Fig. 1.

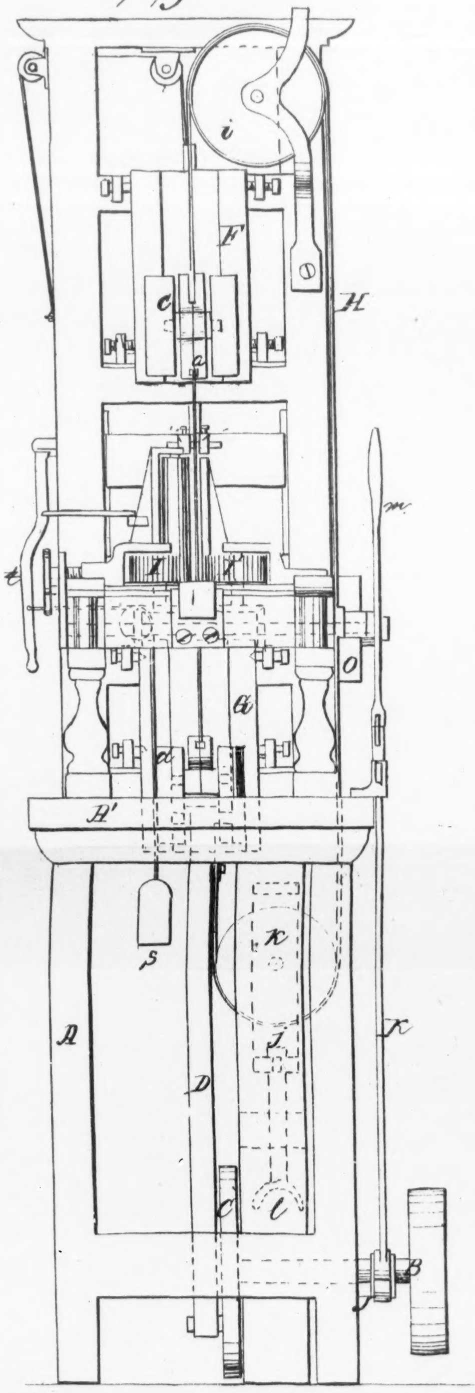


Fig. 2.

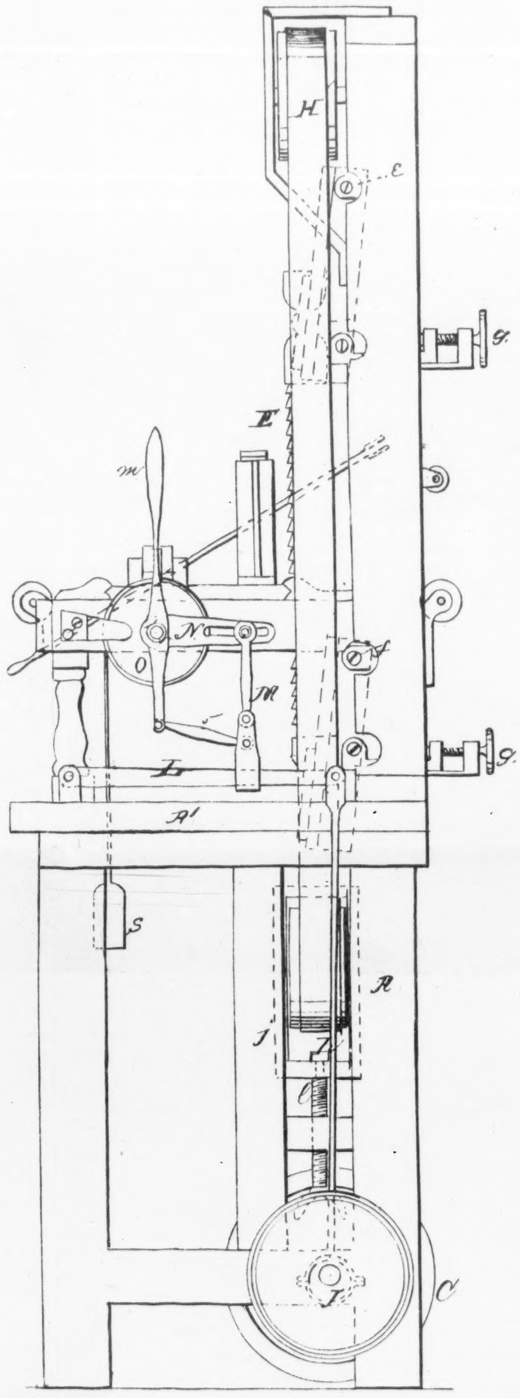


Fig. 3.

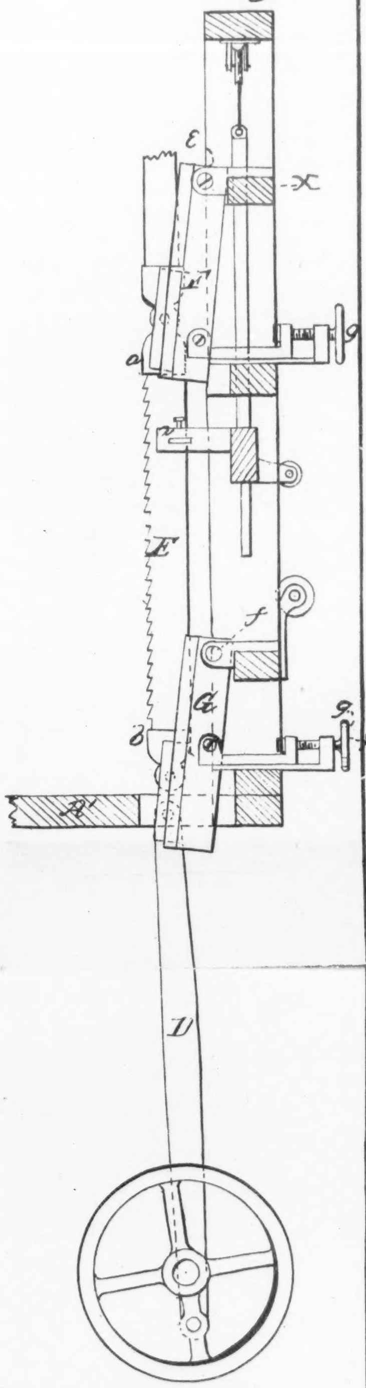


Fig. 5

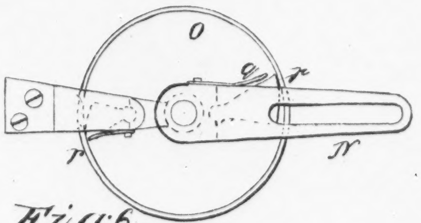


Fig. 4.

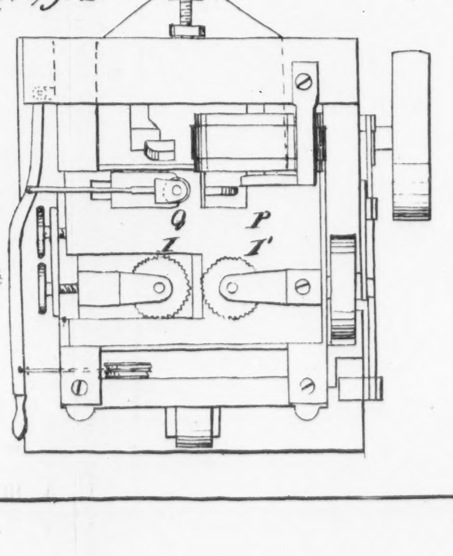
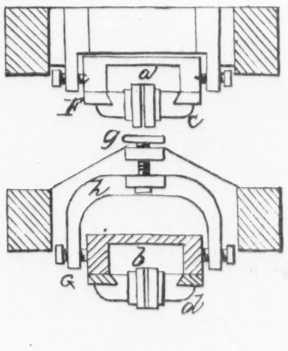


Fig. 8



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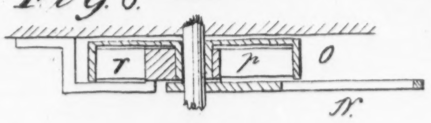


J. RICHARDS.

Improvement in Saw-Mills.

No. 114,043. Patented April 25, 1871.

No. 126
Fay & Co.
v. page 649.
Cordesman
Brothers

Fig 3.

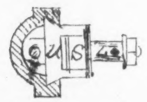


Fig 4.

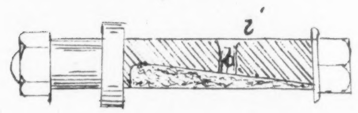


Fig 5.

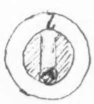


Fig 2.

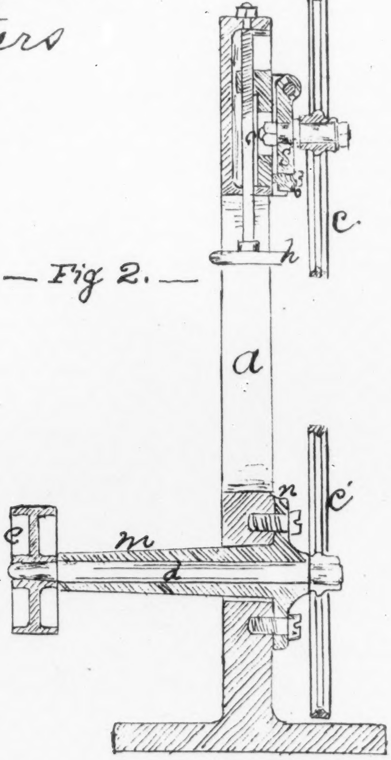
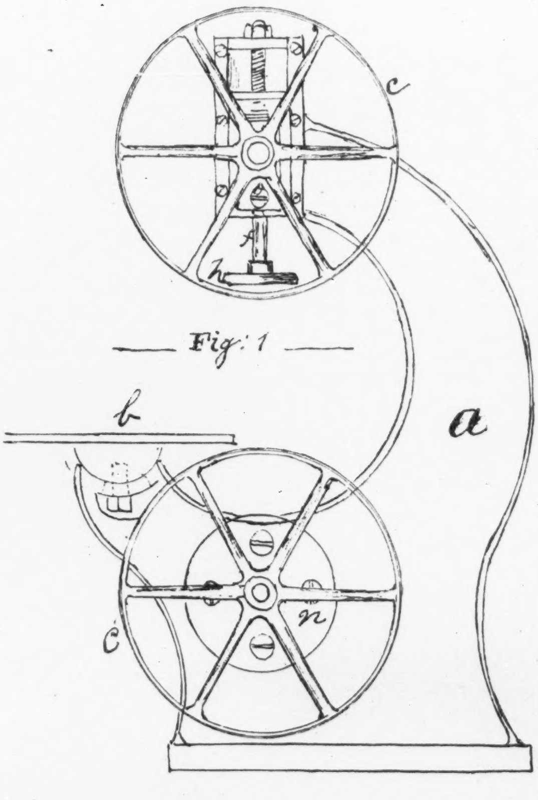


Fig 1

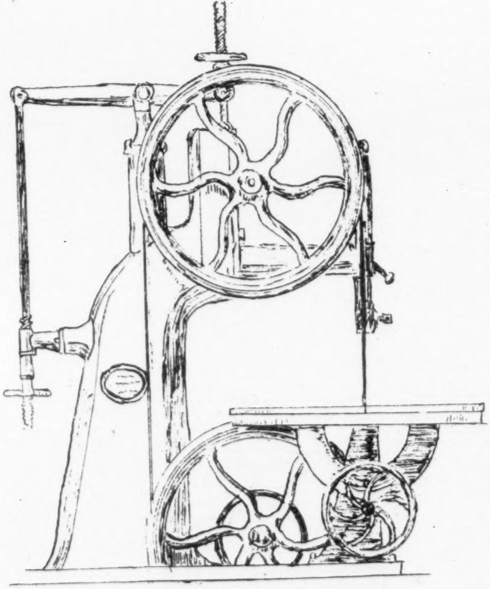


Attest.
Wm S Kelley
Dana L Collier

Inventor
John Richards

No. 126-
Fay & Co.
v. Page 651.
Cordesman Brothers

Band Saw
by
Messrs Powis James
& Co



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Fay & Co.
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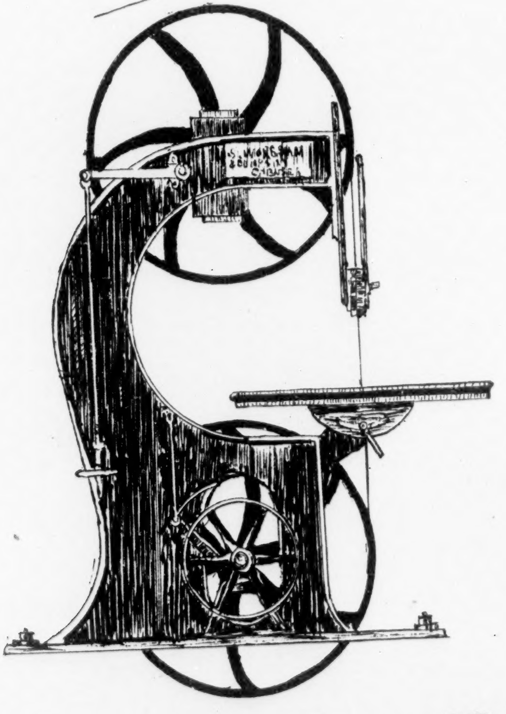
Cordesman
Brothers } page 653.



BAND SAW By messrs WORSSAM & CO

A.D. 1861 Sep 5. No 2220.
GREENWOOD'S Specification.

(1 SHEET)

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Fay & Co.
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Cordesman
Brothers
} page 663.

PP3

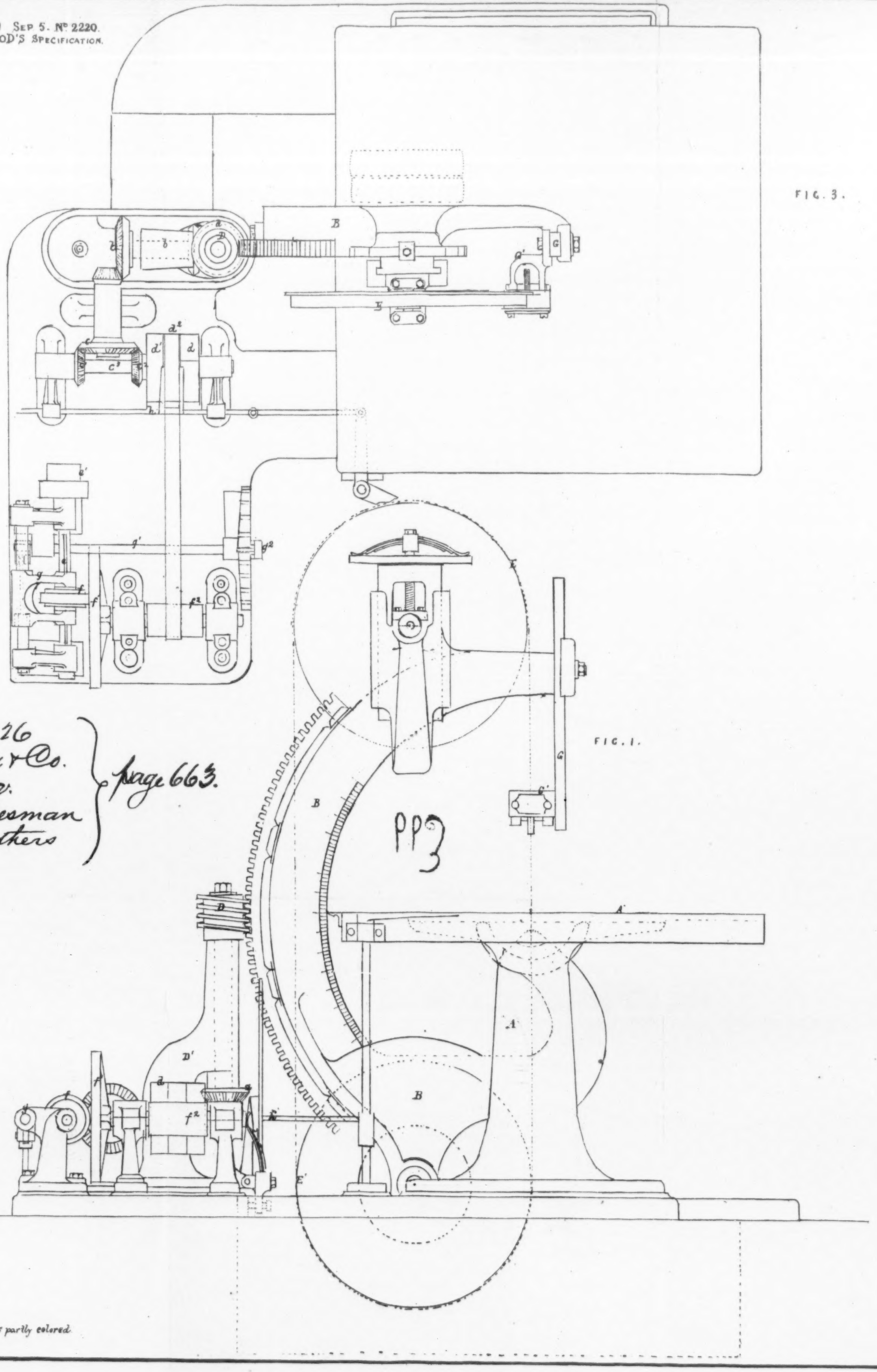
FIG. 3.

FIG. 1.

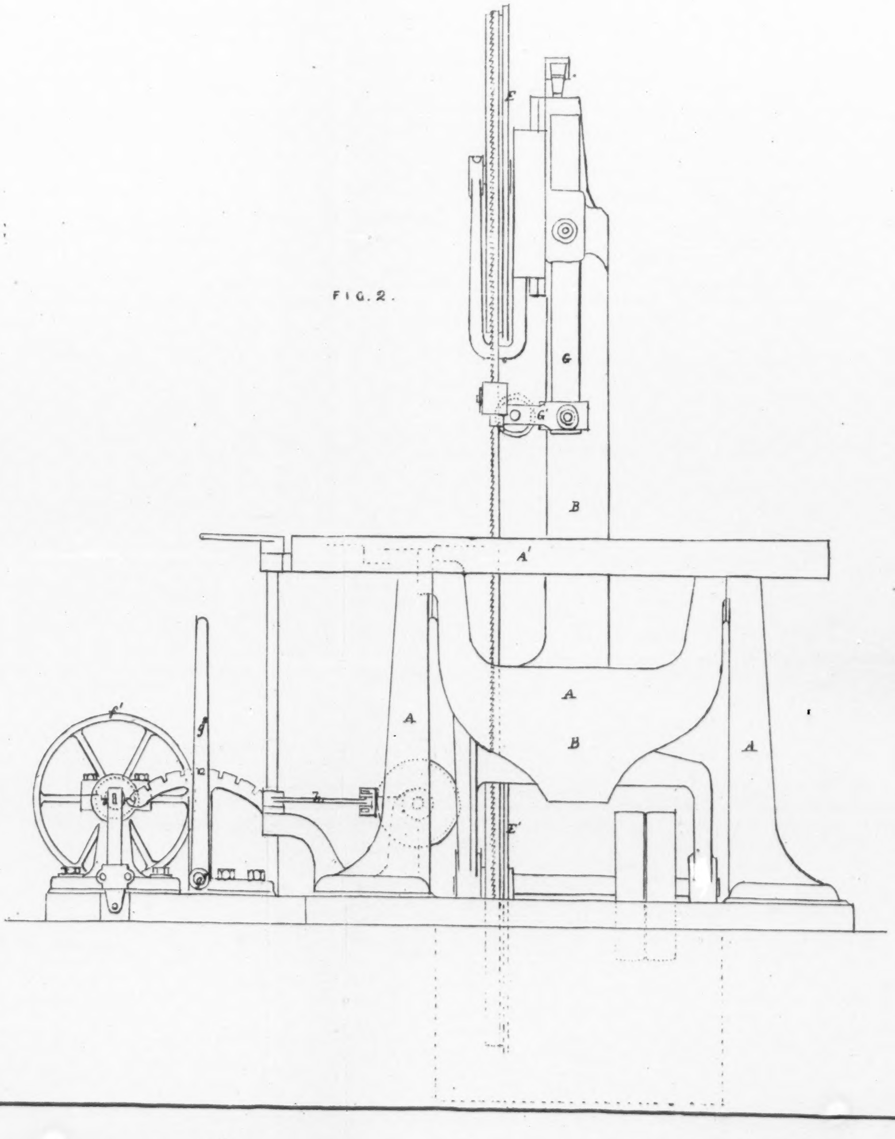
FIG. 2.

The field drawing is partly colored.

W. P.

Sawing Machine.

No. 28,800.

Patented June 19 1860.

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Fay & Co.
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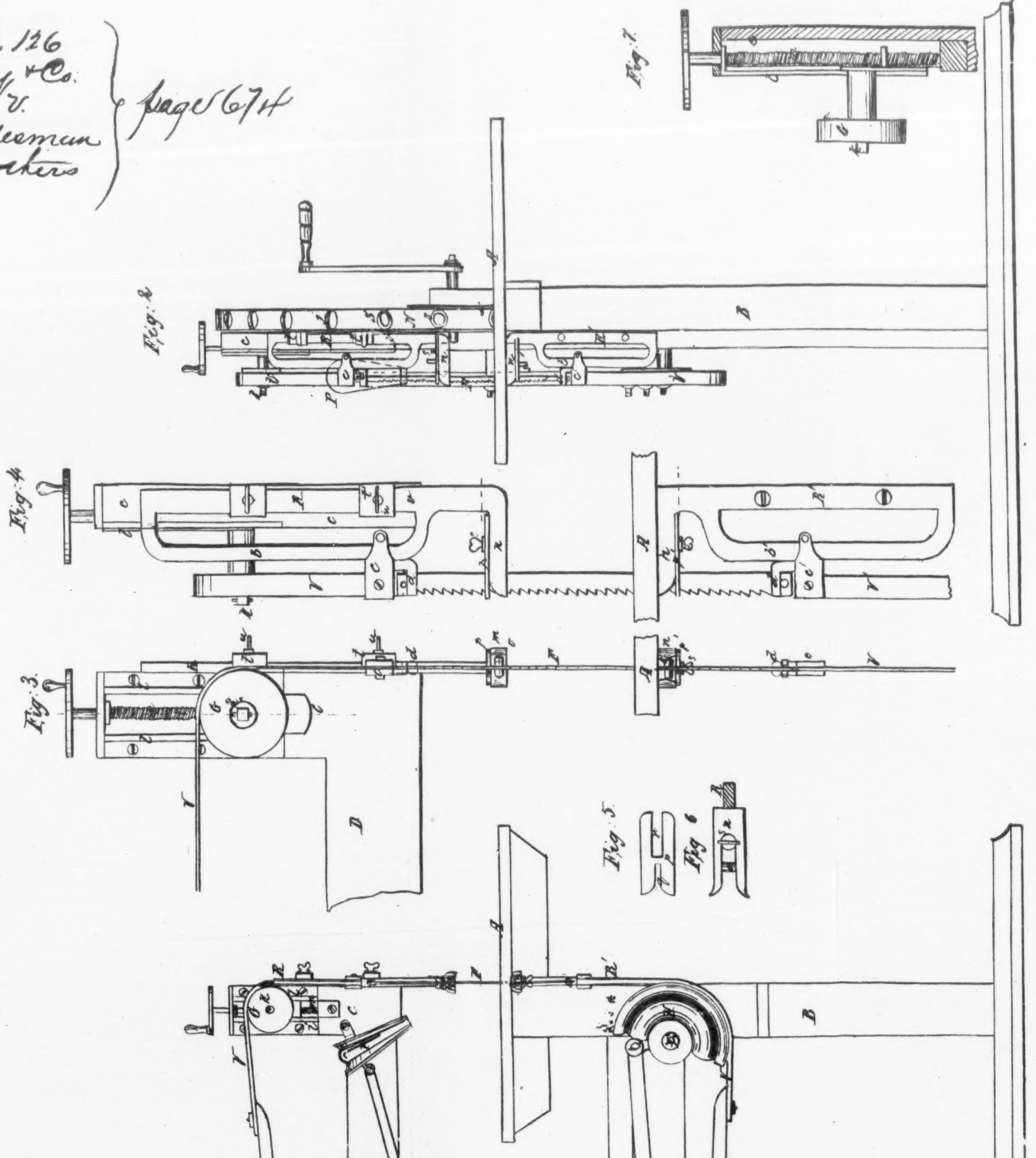
Cordesman
Brothers
} page 674



Witnesses:
James G. Dickins.

Inventor:
William P. Wood